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of

RECENT DECISIONS

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INTERSTATE COMMERCE - CONVICT LABOR

POWER TO EXCLUDE PERSONS AND COMMODITIES

Whether the substantive power given the Congress of the United States to regulate commerce....among the several states" (U.S.Const. Art. I §8) includes the power to prohibit the passage of persons and property in interstate commerce, presents a question as to which no satisfactory general principle has as yet been laid down. The recent case of Kentucky Whip & Collar Co. v. Illinois C. R.R. (81 L.Ed.183, U.S.) is no more definite in this respect, but the nature of the holding is such as to indicate the answer to several of the difficulties raised by Hammer v. Dagenhart (247 U.S.251). Petitioner sought a mandatory injunction compelling the carrier to accept for interstate transportation, goods manufactured in Kentucky with convict labor, which the respondent had previously refused on the ground that they were not labelled as required by Act of Congress of July 24, 1935 (U.S.C.A. 61-2) by which it was made unlawful to transport goods made by convicts, into any state where the goods are intended to be "received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state." The lower court sustained the Act in its entirety and this view was unanimously adopted by the Supreme Court (Cf. Supra).

The result thus reached was in accord with the many authorities affirming this plenary power of Congress over the transportation of diseased livestock (Reed v. Colo., 187 U.S.137); lottery tickets (Champion v. Ames, 188 U.S.221); adulterated and misbranded articles (Hipolite Egg Co. v. U.S.,220 U.S.45); women for immoral purposes (Hoke v. U.S., 227 U.S.308); intoxicants in states prohibiting their use (Clark Dist. v. W.Md.R.R., 242 U.S.311); stolen motor vehicles (Brooks v. U.S., 267 U.S.432); diseased plants (Ore.Co. v. Wash., 270 U.S.87); and kidnapped persons (Gooch v. U.S.,297 U.S.124), but ith the exception of the last three, these cases were decided prior to the time the decision in Hammer v. Dagenhart (cf. supra) was handed down. A majority of five Justices in that case held the Keating-Owen Act (1916),-which forbade interstate transportation of products of establishments in which within thirty days prior to shipment, children were allowed to work - was an infringement on the rights reserved the states under the Tenth Amendment.

Rather than trace the subsequent history of the last case as such, it will be more profitable to analyze the reasoning which was then advanced in its support, and to note the recognition since accorded to each. The first of these, which may be denominated the argument from principle, is that the power to regulate, does not in its legal nature, include the power to prohibit. "It is the power to regulate, i.e., to prescribe the rule by which commerce is to be governed -- in other words, the power is one to control the means by which commerce is carried on -- which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities." (Hammer v. Dagenhart, p.269).

Of all the premises on which were based the conclusion in the Hammer case, this alone is clearly without substantial foundation. "Regulation means the prohibition of something." (Holmes, dis.). That any regulation is a prohibition pro tanto, and that a prohibi-

tion is nonetheless such because its subject is deemed an evil, should be self-evident. A requirement that explosives be securely packaged before being transported, is regulatory, but explosives not conforming to the "regulation" are "prohibited" from passing in interstate commerce. If Congress required that the packaging be done by adult labor, to declare this to be prohibitive, and not a regulation, would be mistaking a difference of degree for one of kind. Both are performed in intrastate commerce, and both can be remedied there. And the same may be said where the evil is not remediable, as in the case of an infected article which might contaminate other goods in the course of transportation. Yet there, Congress would clearly have the authority to exclude such altogether, although prohibitive, because of its relation to interstate commerce proper. While it is true that a difference of degree often determines the reasonableness of an exercise of a given power, and consequently its constitutionality, an argument that from the nature of the power involved, there is an absolute lack, cannot be made to depend on questions of degree. It is not strange that in the very next case, the court swung around to the opposite view. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any other evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power for the benefit of the public within the field of interstate commerce." (Brooks v. U.S., supra).

In the case at bar, the court in express recognition of this fact, confirms the latter stand even to the extent of collating the decisions and classifying them for future guidance. One group will give little trouble. The denial of interstate transportation may be designed as a reasonable means to render effectual a policy which in itself Congress has the right to enforce. Thus prohibiting transportation by carriers of commodities owned by them, or a regulation as to corrosive substances, bears a direct relation to the safety and efficiency of interstate transportation. In the last analysis this type of regulation is the same in principle as the Safety Appliance Act. As auxiliary to the enforcement of a constitutional policy, Congress may impose regulations which - except as being of an ancillary character - it could not impose. (U.S.v. D.& H., 213 U.S.366). But when it is said that Congress may protect interstate commerce against the "pollution" caused by lotteries, it must be read in a figurative sense, and classification made under a different heading.

It is where the result sought to be discouraged bears no real relation to the safety or convenience of interstate commerce that the difficulty arises. These cases the Chief Justice classifies according as the anticipated evil proceeds from something inherent in the subject of transportation or in its purpose; in a word, whether the goods are unfit, or are harmless in themselves. The former would include cases arising under the Pure Food and Drug Law, liquor, diseased products, and lottery tickets; the latter would embrace the statutes relating to white slavery, kidnapping, and stolen automobiles. In all these, the question arises in all its vigor, consequently the very fact of classification implicitly recognizes that regulation means prohibition. Whether this power is plenary had best be discussed later.

The next question dealt with in the Hammer case was whether the court was constrained by authority to adhere to the position which in principle it had just rejected. "But it is insisted that the adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities... In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended." (p.270)

In finding this element to be wanting and thus distinguishing the cases, the court clearly had refernnce to the effect on health and living conditions caused by the employment of child labor in the state of origin, as distinct from the effect on economic conditions in the state of destination. The latter was not only reserved for separate discussion, but the distinction was made on the ground that the goods were harmless, and that "the act...aims to standardize the ages at which children may be employed....within the states. This was to be accomplished, not directly, as this lay beyond the Federal sphere - unlike a carrier transporting its own goods, - but by making it unprofitable to continue conditions similar to those on which the exclusion of the article in question was based.

Whether due consideration for the rules of stare decisis would dictate thisposition has been disputed (Willoughby 592-a). By the exercise of an acknowledged power, Congress may reach indirectly a result which it is not constitutionally authorized to reach directly Since Congress can regulate the currency, the regulation may validly take the form of a tax, regardless of whether or not it would have been sustained purely as a revenue measure. (Veazie v. Fenno, 8 Wall.533). And a valid excise will be sustained without inquiry into whether it is regulatory. (McCray v. U.S., 195 U.S.27). Since the power of exclusion had been conceded in earlier cases, the motive prompting its exercise might well have been deemed beyond the pale of judicial inquiry. This is shown by the intimation of the court in U.S.v. Dougherty (269 U.S.360) that the Hammer case might necessitate a further consideration of a tax which had already been upheld (U.S. v. Doremus, 249 U.S.86) on grounds similar to those pointed out.

But the result reached may be acknowledged to be a proper limitation on the Congressional power. Conditions of production in the state of origin insofar as they affect only the inhabitants of that state, bear no reasonable relation to anything within the competency of Congress to protect, either in interstate commerce proper, or in other states. Without this qualification, the dual system of government would be destroyed. Although no case has arisen as yet in which this principle has been again applied, its validity should be unquestioned. The difficulty comes in applying it to the facts. While correctly stating that conditions in the state of origin will not warrant Federal action, the decision really overlooked the effect produced in other states, as will be seen by the case at bar.

In connection with this latter feature, it was finally argued that the effect of circulating such goods in other states and "the unfair competition thus engendered" was sufficient to authorize Congressional interference by closing the channels of interstate

commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standards of other states. To this the court made answer that "there is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some states laws have been passed fixing minimum wages for women. In others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulation. Surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress....The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture." (p.273).

This completes the chain of reasoning in the case. Having admitted that previous cases upheld the exercise of congressional power designed to avert harmful results in states other than the one where the interstate transportation would have been commenced, and having now decided that evil effects in the state of origin do not justify such exercise, it only remained for the court to hold that this case involved the latter feature solely. Despite the truth of both the premises, it will readily be seen that the correctness of the result necessarily depends in addition, on the last proposition. In this respect the case at bar is highly important. The Senate Committee in reporting out the Ashurst-Summers bill, indicated that the purpose was to combat the evils attending the sale of such goods in competition with those produced by free labor. After establishin that the power granted under the Commerce Clause may involve denying the facilities of interstate transportation to commodities, the cour in the instant case, in determining that this particular exercise of that power was not arbitrary, remarked, "The Congress in exercising the power confided to it by the Constitution is as free as the state to recognize the fundamental interests of free labor." Likewise it confirmed a previous case which proceeded on the theory that "free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison" and upheld legislation based on that conception. (Whitfield v. Ohio, 297 U.S.431). It is apparent that the court, in the case at bar, while upholding the power of Congress to discourage evils affecting other states, and not questioning the view as to the lack of power to regulate evils affecting the state of origin alone, was of the opinion that competitive conditions insofar as they relate to other states, were, despite Hammer v. Dagenhart, proper objects for the exercise of the police power.

It would not be seriously contended that there was any reasonable ground of difference to be discerned between the effect of child and convict labor. Both are within the competency of the individual states to regulate within their own borders. As the court remarked in the Kentucky case in relation to intoxicating liquors, "The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The

pertinent point is that where the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may if it sees fit, put forth its power to regulate interstate commerce so as to prevent that being used to impede the carrying out of the state policy."

A distinction may be attempted to be drawn on the basis that the statute invalidated imposed the prohibition without regard to the laws of the state for which the articles were destined, whereas the operation of the act in the instant case was confined to states whose local laws had imposed restrictions on the subject matter with in its internal commerce. Some parts of the opinion in the Kentucky case would lend support to this view, as for instance the statement upholding the power of exclusion of traffic which the state "has constitutional authority to forbid and has forbidden in its internal commerce." A reasonable argument may be made in this way, thus that in the absence of the statute, the state's impotency is due not to inherent constitutional imcompetence, but that Congress by its silence on a matter requiring uniform treatment, had in effect declared that this subject should be free from state interference, so that by the enactment Congress simply removed an impediment to the enforcement of state law in regard to goods in the original package. But although the law enforced and the agency of enforcement is that of the state, the sanction is Federal. Congress neither acts "on any assumption of a power enlarged by virtue of state action (Kentucky Co. v. Ill. RR, supra) nor can it delegate its power to the state (Clark Dist.v. W.Md.RR, supra). Citizens of the state where goods are produced, have the right to move them in interstate commerce, free from interference by other states, in relation to matters requiring uniform treatment, if they are legitimate subjects of commerce (Leisy v. Hardin, 135 U.S.100).

It is difficult to see how the consent of the state could affect that right; or how, being impotent of its own accord, its concurrence could create a power whenever Congress acted, if the latter body had not authority to exercise it in its own behalf, for the state has concededly no power until Congress does act. And if Congress has the power of its own motion, the consent of the state is immaterial. A sovereign right of its nature is not dependent on consent, nor can it be conceived of as joint.

Moreover, numerous cases uphold the power of Congress without regard to this feature, where an evil, other than a competitive one, existed which was at all competent for Congress to regulate. The Hammer case turned on the point that the end was unavailable,-not the means,-and once the evil deemed to be beyond the range of Congressional disapproval in that case, is admitted to be within it by the case at bar, there is no reason why as in the case of any other harmful result within the competency of Congress to regulate, that body may not in its discretion employ either indirect means. In no case where an evil existed capable of restriction, was the prohibition deemed invalid because the proper method had not been selected, and in the onlycase in point, the argument was instead concerned with whether the limitation of the operation of the statute to such states as disapprove the subject or practice, affected the validity it would otherwise have had.

"It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in thechannels of inter-

state commerce, and had thereby prohibited all movement between the several states such action would have been lawful, because within the power to regulate which the Constitution conferred.... The issue therefore is not one of an absence of authority to accomplish in substance a more extended result than that brought about....but of a want of power to reach the result accomplished because.....the method resorted to for that purpose.....by subjecting interstate commerce in such liquors to the control of the states...in the nature of things was wanting in uniformity. In view of the conceded power on the part of Congress to prohibit the movements of intoxicants in interstate commerce, we cannot admit that because it did no exert its authority to the full extent, but simply regulated to the extent of permitting the prohibition in one state to prevent the use of interstate commerce to ship liquor from another state, Congress exceeded its authority to regulate." (Clark Dist.v. W.Md.RR., 242 U.S.311).

Henee the present method was there upheld because of the availability of the means employed in the Hammer case. Whenever the former is sustained, it is accordingly a reasonable assumption that the latter could have been used. In other words, Congress formulate its own policy and establishes its own rule, whether or not that rule is designed to coincide with local law. Where the conclusion is reached the premise may be inferred, and while the latter may hav been shaken by the later Hammer case (247 U.S.), the result in the Clark case was expressly reiterated in U.S. v. Hill, 248 U.S.420; c Kentucky v. Ill., supra). The States now have the power to prohibi the importation of liquor under the Twenty-First Amendment (State Board v. Young's Market,57 S.Ct.76), but the principle is applicabl to other subjects (Kentucky case, supra).

The existence of the Congressional power being established, an inquiry into its nature and limitations is inevitable. It has been suggested that the interstate carrier system is a Federal agency, like the national banks and the postal system, the use of which may be withheld at the will of the general Government (Willoughby 590). In whatever sense this has been put forth, it would seem to be justi fiable only if regarded as analogous, rather than definitive. The transportation of one's own goods is interstate commerce (Pipeline cases, 234 U.S.548)and this too is therefore forbidden by the Ashurs Summers Act. It would be as profitable to argue that a manufacture of any given commodity is a Federal agent, because by the levying o an excise, the business could be taxed out of existence (McCray v. U.S., supra).

It has also been urged that a business should for this purpose be considered as a whole, of which the use and consumption of the goods would be as much an integral part as the production itself.(W loughby 592-a). It is said that Congress itself has forged the connecting link; that in allowing the use of interstate commerce,it has joined consumption with production,by making the whole economically possible, and that the whole should be considered to be interstate commerce. If considered to be such for all purposes,it would be clea that Congress could enforce its policy by direct regulations of the type now employed within the limits of interstate commerce as preser ly defined. Such is not intended, the author meaning that for the pu poses of that particular type of regulation, viz., exclusion, such shall be considered commerce among the states, with the result that any evil bearing a real relation to interstate commerce is thus de-

fined can be regulated in this indirect manner, just as the same could be done directly, if deemed interstate for all purposes. This is too broad, for conditions of production are within its supposed scope, and consequently could be regulated although they affected only the state of origin - which would be directly contrary to the reasoning of the Hammer case. In justification to the author, it must be noted that both explanations were prompted by the position taken by the dissent in that case, which was discussed above. This was, briefly, that this power is a plenary one which may be exercised whenever Congress sees fit; that its discretion in this regard was arbitrary and could be directed towards regulating production for any reason, including the effects occurring in the state of origin, because the courts will not inquire into the motive for the exercise of an acknowledged power. In effect the right to engage in interstate commerce would not merely be one protected by the Constitutic against state control, but one which owes its very existence to Federal law. The above illustrations would be very much in point, if this view had been adopted. The right of use would be created by Congressional inaction. The business considered as a whole would be in effect the creature of law and could be destroyed by the power creating it. But this authority is not illimitable. (Cf. infra).

The power would instead seem to have its foundation in the inherent right of sovereignty possessed by every nation to guard itself from injury from without. This may take the form of military defense, embargoes, immigration restrictions, prohibitive tariffs, quotas, and exchange regulations, to mention but a few. We are concerned with the commercial aspect. Thus the plenary power possessed by Congress over foreign commerce is derived partly from the delegation of the substantive power over foreign relations, partly from the Commerce Clause.

Before the adoption of the Constitution a state as an independent sovereignty could regulate the passage of imports and exports while within its borders, and could moreover embargo the latter and prohibit the former at will. Under the Constitution, the state of origin can not prohibit exports, even where the regulation merely takes the form of a discrimination against interstate commerce in disposing of its natural resources (Pa. v. W.Va., 262 U.S. 553). The state of destination lost the right to prohibit imports (Leisy v. Hardin, supra). What the state surrendered by conferring on Congre the power to "regulate" commerce, it is reasonable to suppose the Federal Government gained, inasmuch as there are no words of restri tion in the grant. Commercial rivalry between the states was the most cogent circumstance leading to the framing of the Constitution But the reason for a grant of power, while amply supporting a construction by which it is extended to that which was sought to be remedied, is not to be considered as limiting that power. (Adyston Pipe v. U.S., 175 U.S. 211).

In withdrawing this field of legislation from the control of the states, it is no more rational to suppose the framers intended that the Federal Government, as well, should be unable to govern, than to infer an intention to constitute itthe depository of the power, to be exercised, however, for the benefit of the whole, rath than the individual interests of the states. Regulation itself was not condemned as such, but for the reason that the purpose for which it was exercised was not in the general interest. This view finds confirmation in the general structure of the Constitution. If the

power previously possessed by the states was not contained in the grant expressed in Art.I §8, it would seem to be retained by the states, yet such a stand is without foundation (Cf. cases supra). The only supposition left is that it was destroyed, but that idea is in its nature repugnant to the concept of delegated powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people" (Tenth Amendment). The states are prohibited from exercising this power over interstate commerce and ipso facto, it is not reserved to them. Nor does it infringe on the individual rights reserved to the people, assuming the subject matter to be one which the state is competent to regulate in its internal commerce. For if the assumed individual right will admit of regulation by one sovereignty in its proper sphere, there is nothing in its nature forbidding another to attempt to accomplish the same result within its own jurisdictional limits. The rights reserved to the people under the Constitution are such because they are protected from infringement both as against the Federal Government and the States. The sovereign power is in effect destroyed because in that respect the individual is freed from coercion from whatever source.

If the state of destination may regulate hours of labor, Congress is not infringing individual rights by utilizing indirect regulation adapted to the same end. It is not a right secured to the people as distinguished from the local government, and the only question is whether the regulation is within the jurisdiction of the sovereign attempting it, rather than the other. That is to say,-not does the power exist, but since it does, - who may properly exercise it? For the same principles will govern the validity of a statute regulating hours of employment, minimum wage contracts, "yellow dog" contracts, etc., whether it is directed by a state to its internal commerce (Morehead v. N.Y., 297 U.S.___; Coppage v. Kansas, 236 U.S.1); or by Congress to those engaged in interstate commerce or within its territorial jurisdiction (Adkins v. Hospital, 261 U.S.525; Adair v. U.S.,208 U.S.161; cf. Block v. Hirsch, 256 U.S.135; People v. Lafetra 230 N.Y.429). Hence if a proper object of state action within its domestic economy, the subject of the regulation is not a right reserved to the people.

Since the power of exclusion is neither retained by the States, nor destroyed by guaranteeing individual immunity, the only alternative remaining under the triple division of sovereignty is that this power is possessed by the Federal Government. In its origin and nature it would seem to be a composite of the various sovereign rights relating to this subject which were included in the delegation of power by the several states. This view of the States' position was succinctly stated in the dissent in the Hammer case, p.281). "They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state lines they are no longer within their rights. If there were no Constitution and no Congress the power to cross the line would depend on their neighbors. Under the Constitution such commerce belongs not to the states but to Congress to regulate. It may carry out its views of public policy whatever indirect effect it may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express." (Holmes, J.)

Such an analysis throws considerable light on the question whether the power of Congress to interiere is dependent on the consent of the state of destination. That the position of the state of origin was substantially the same has already been indicated. But it may be contended that the state where the journey terminates is not only bound by the Constitution to allow such commerce, but has acquired thereunder the right to have it allowed, so that this privilege cannot be impaired by the Federal Government without its consent. Following the lines of the reasoning outlined above, it would seem that the transfer of its own option to prohibit or allow was not accompanied by any restriction against turning it against its creator. And originally the power to exclude did not carry with it the right contended for, since the exporting state could lay an embargo. When this power among others was delegated to Congress, the other states acquired the right to be free of State, -not Federal- intervention. Finally the assumed right would in the nature of things be infringed quite as much by regulatory, as by prohibitive, measures of the Federal Government. This would nullify the grant if indeed it could be determined where regulation stops, and prohibition begins. "It is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result. Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any state would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce, the states did not secure absolute freedom in such commerce, but solely the protection from encroachment afforded by confiding its regulation exclusively to Congress. By the adoption of the Constitution, the ability of the several states to act upon the matter solel in accordance with their own will was extinguished and the legislative will of the general government substituted." (Re Rahrer, 140 U.S.545). While this case involved a statute similar to that employed in the case at bar, the reasoning is equally applicable to a statute which does not defer to local law.

Various limitations inherent in the power granted to Congress have been indicated in the decisions on the subject, and touched on above, but for the sake of clarity they will be summarized here. First of all, Congress by this form of regulation may not destroy individual rights. It may prevent interstate transportation from being used to bring into a state articles the traffic in which the state has constitutional authority to forbid in its internal commerce. (Kentucky case, supra). As the state cannot by direct regulation enforce minimum wage scales based on the cost of living, it seems clear that this result cannot be achieved indirectly by Federal action. Secondly, Congress may not impair the rights reserved to the states under the Tenth Amendment (Hammer case, supra). Transportation must be a step in bringing about the result disapproved, so that the harm will occur in the state to which the article is transported. It is not a sufiicient ground to warrant Federal interference that there is an evil, where that evil has already been nrought about in the state of origin, and will do no injury, moral or physical, in other states. The Hammer case still is authority for the proposition, for example, that Congress could not use this power of indirect regulation simply because the noxious conditions surrounding the operation of a slaughterhouse are in such proximity to a residential section as to endanger the health of the inhabitants. But if the conditions of production affect the wholesomeness

of the products themselves so as to endanger the consumers, Congress may interfere to protect the health of citizens of other states. If there is a real relation between the rule and the carrying on of commerce, the regulation will be valid even though the ultimate effect will be to regulate another evil really sought after. If an evil, though perpetrated in one state, is not consummated there, or, although completed there, produces a further and distinct harm in another state, thus furnishing an independent ground of intervention, the national Government may step in. The former is illustrated by the National Motor Vehicle Theft Act where removal of the property from the state would aid in frustrating its laws. Congress may punish this because of "its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." (Brooks v. U.S., supra). The latter was upheld in the case at bar. Whether sweatshops, or forced and underpaid labor, are so injurious to those employed or to the community as to warrant regulation, is left to the determination of the state where the conditions exist. But Congress may safeguard another state against the effect of unfai competition on its own markets, even though by confining sales to on state, the business is rendered unprofitable, and the result is to force the manufacturer to remedy the condition and thus obviate an effect which of itself would not suffice to sustain the regulation. In the former the harm is done in the state of origin and relates solely to the citizens of that state. In the latter, the harm, creating the authority of Congress to intervene, is accomplished in the state of destination, and relates to its citizens. In the Brooks case, an intermediate situation is presented. The evil justifying interference, viz., the removal beyond the jurisdiction, really occurs on arrival, and may be said to occur in the second state, but it does not affect its citizens, but only the owner - a citizen of the first state. In this it goes a step further than Hoke v. U.S. (supra, cf. white slavery) but it is justifiable on the ground that not only were the rights of the citizens disregarded, but also the majesty of the state of his residence was flouted, it being a criminal offense by its laws.

This bears on the suggestion of the National Manufacturing Association that the pending Clark-Connery bill be amended to prohibit interstate transportation of goods produced by children in violation of the laws of the state of origin, as well as to subject them to the law of the state of destination. (N.Y.Times, Feb.7, 1937). This would prevent bootlegging in the products of child labor in the state of origin. Whether otherwise an act committed within its borders, but with no harm resulting to the inhabitants of that state, would justify interference, is probably an academic question.

There is the final possibility, always existing in the absence of a contrary decision on a subject, that the court, in viewing competitive evils from a purely practical standpoint, will decide that Congress should confine itself to reinforcing standards adopted by the states, as here, and not undertake to set up its own, as in the Hammer case. This could be distinguished from the Hipolite case, in that the goods were harmless, and the evil effect therefore indirect, and from the Brooks case, where the goods were harmless, on the ground that the resultant evil there affected citizens of the state of origin, whose laws were violated, and not citizens of the state of destination.

As to the justice of the result reached in the instant case, it

should be noted that the regulation not being direct, businesses serving a restricted area are not affected, whereas the very fact that others are so dependent on interstate commerce that they cannot continue without it is in itself an implicit admission that they are a matter of national rather than local concern. From this point of view, statutes of this nature may be the most acceptable form of compromise between advocates of centralization and states' rights adherents.

ALBERT JOSEPH O'CONNOR

DUTIES OF FIDUCIARIES IN INVESTING TRUST FUNDS

The very nature of trust estates is such that a trustee is subjected to a dual responsibility. He must so invest the funds coming into his possession that the beneficiaries of the income may receive a reasonable return upon the principal and at the same time his investments must be chosen with great care in order that, upon the termination of the trust, the principal may be transferred to the remainderman or reversioner as nearly unimpaired as reasonable care will allow.

The policy of this State respecting trust investments, stated in King v. Talbot, (40 N.Y.76) enunciated in 1869 has stood unquestioned to this day. The court therein says, "The just and true rule is that the trustee is bound to employ such diligence and such prudence in the care and management of the estate, as, in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs.

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into consideration the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

"It, therefore, does not follow that, because prudent men may and often do conduct their affairs with the hope of growing rich and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund and the procurement of a just income therefrom are the primary objects of the creation of the trust itself and are primarily to be regarded.

"The moment the fund is invested in bank or insurance or railroad stock, it has left the control of the trustees and its safety and the hazard or risk of loss is no longer dependent upon their skill, care, or discretion in its custody or management and the terms of the investment do not contemplate that it ever will be returned to the trustees.

"If it be said that at any time the trustees may sell the stock (which is but another name for their interest in the property or business of the corporation) and so repossess themselves of the original, such a possibility is necessarily conteingent and uncertain and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies; first, the practicability of making the business profitable and, secondly, the judgment, skill, and fidelity of those who have the management of the business for that purpose."

As stated, this rule has been consistently followed from the date of its formation to the present time. A few of its almost innumerable applications may be found in Adair v. Brimmer (74 N.Y.539) Matter of Wotton (59 A.D.584); Hine v. Hine (118 N.Y,585); Matter of Hall (48 A.D.488); Putnam v. Lincoln Safe Dep.Co. (87 A.D.13).

This rule lays down the policy of the State as to what shall be considered a safe and conservative investment and has been crystal-

lized in §21 of the Personal Property Law and §111 of the Decedent Estate Law as well as in certain banking laws. In all these statute the fiduciary is limited to certain specified types of investments. A delineation of them here cannot be made, however, because of their great detail.

Like other rules of testamentary and trust construction, these statutes requiring fiduciaries to invest in certain specified securities will yield to an unmistakable evidence of a contrary intention on the part of the testator or trustor, for every such person so disposing of his property is at liberty to direct the method of its management. It has been repeatedly stated, however, that fiduciaries will be held to the duty of investing only in legal securities unless directions to the contrary are clear and unquestionable and even in such case the trustee will be protected only insofar as he strictly pursues the authority bestowed but in some cases this rule is not strictly applied.

In Matter of Robbins (135 Misc.220), the will of Jarvis Robbins directed that sums bequeathed for the erection of certain trusts "shall be safely and conservatively invested by said executors and trustees." It was held that such a will gives no discretion and that the trustee was justified in investing only in legal securities.

In Re Soltau (118 Misc.880) an executor and trustee was given by will "full power to do any and all things that may be requisite or proper in the settlement" of the estate, including the power to keep the estate safely invested. The surrogate ruled that the executor and trustee was not authorized to depart from the general rule requiring the investment of the trust funds in securities authorized by law.

A provision in a will empowering the trustee to invest and reinvest the trust funds "in such manner and upon such securities as to them shall seem advisable" does not give the trustees authority to invest in railroad bonds when such bonds are not legal securities (Re Keteetas, 6 N.Y.Supp. 688).

In Re Reed (45 A.D.196) where a will gave a trustee power to invest trust funds in such manner and upon such securities as to him in his discretion may seem proper, the court held that the will did not authorize the trustee to make any specified investments or to transcend the general rules applicable to the duties of trustees and that he had no authority to invest in unimproved land in another state.

In Matter or Harbeck (138 Misc.458) the will provided, "They (the trustees) shall as soon as practicable after my decease loan out or invest the fund in first-class railroad bonds or stock or any such other securities or property as they in their best judgment shall deem proper." It was the opinion of Surrogate Wingate that "It is far from clear that any authorization is given in this will beyond 'first-class railroad bonds or stock' since on ordinary principles of construction the discretionary power extended only to first-class railroad stocks and bonds and otherwise the trustee was authorized to invest only in first-class investments of a legal or semi-legal character."

In Re Channing (129 Misc.393), however, the trustee was empowered by a paragraph in a will to sell, as it deems best, real or personal property of the estate "with the right to its discretion to invest and re-invest the proceeds of any such sales." The surrogate contended that this clause did not of itself permit investment in non-legal securities but that a later provision in the paragraph to the effect that, if one or more of the testator's sons are living at the time of such sales or investments, the concurrence of at least one of them shall be necessary to give validity to the sale or investments, clearly indicated an intention upon the part of the testator to confer authority on the trustee to purchase non-legals.

In Dunkle v. Butler (30 Misc.58) where a trustee's instructions under the will provided that he keep the trust invested in good, sound, dividend-paying securities and invest and re-invest the trust estate in his own discretion, the court held that the language used by the testator considered with the fact that part of the trust estate was already invested by the testator in non-legal securities afforded a conclusive interpretation as to his intent and that under the proper construction of the will, the trustee was empowered to re-invest in non-legal securities using always the fair business discretion which the law requires.

In Re Mersereau (135 Misc.387) the testator provided "I hereby empower my said trustee by and with the written consent of my executors, if in their judgment, it be for the best interest and conservation of my estate to sell or otherwise dispose of any of the principal or corpus of my trust estate and to re-invest in other income bearing securities as they may select as being reasonably safe for the investment of trust funds." Surrogate Slater, Westchester County, stated that in his opinion the trustee was not confined to legal investments. He proceeded to say that there is a lodgment of discretion in the trustee to re-invest the proceeds of sale in other income-bearing securities "as they may select as being reasonably safe."

It may be observed from the decisions cited above that there is no clear consistent rule applied in interpreting investment directions. At times it would seem that an unduly liberal construction is implied and at other times an unduly stringent one. It would seem that trustees would be acting most wisely if they refused to invest in non-legal securities unless the creator clearly and unquestionably authorizes them to do so.

It should be noted, however, that the statutes directing fiduciaries to invest solely in legal investments unless contrary directions appear in the trust instrument leave untouched the obligation of the trustee to act with prudence, foresight, and vigilance. Whether the trustee is confined to securities authorized by statute or whether he is authorized by will or trust instrument to invest in other than legal securities, he must nevertheless adhere to the rules of diligence set forth in King v. Talbot (supra) and in other leading cases. (Matter of Cady, 211 A.D.373; Durant v. Crowley, 197 A.D.540 af'd 234 N.Y.581; Matter of Randolph, 150 A.D.902). The statutory direction of investment furnishes a potent protection for such investment only where its making is a prudent and otherwise proper act.

The great difficulty arises, however, in determining whether or

not a fiduciary has acted diligently and with prudence and foresight, for there are no definite standards by which this may be discovered. The courts seek to ascertain whether the fiduciaries have sought and analyzed available information, whether it has made prudent decisions upon the basis of information so obtained and whether it has reviewed these investments to find changes in the integrity of the investments thus made. Often the courts peruse the evidence to find indications which will show that the trustee has used the accepted authorities as guides to investment; that it has carefully studied the future marketability of securities; tha it has employed competent assistants, when required, to aid it in pursuing the truth; that those who are to make final decisions are men of experience; that the nature of the trust is carefully analyzed so that the investments are designed to meet the requirements of the trust by guarding against the possibility of having the property in trust impounded beyond the date set for the termination of the trust; that the trust estate is so invested that an undue proportion is not invested in any one security or type of security; that the investments which have been made are carefully reviewed from time to time, to discover any change in the position or adaptability of the investment; that the general investment markets are investigated to determine what effect, if any, changes in the general market may have on the particular investments held. The courts are guided by these and other factors and by weighing them, arrive at a determination as to whether or not the trustee has fulfilled its duties.

It may appear from subsequent events that the judgment of the fiduciary in selecting or retaining securities was wrong, but if it has acted prudently, the law will not penalize it for a lack of possession of the gift of prophecy. (Matter of Clark, 257 N.Y.132; Matter of Varet, 181 A.D.446.

In conclusion, the duties of the trustee may be briefly defined as: 1. The duty to invest the fund in securities which will provide a reasonable return to the beneficiaries of the income; 2. The duty to invest only in legal securities unless clearly authorized by the will or deed of trust to invest in other than legal securities, and 3. The duty to select investments with such diligence, prudence, and foresight as, in the opinion of the courts, prudent men of discretion and intelligence in such matters employ in their own affairs.

THOMAS JOSEPH CROWLEY

PRICE FIXING

"The old order changeth yielding place to new..." The time-tried economic principles which have served the country so long have, in the opinion of some, become worn out and new and different principles have been substituted. Monopolies and price fixing have, theretofore, been considered unlawful restraints upon trade. The courts in cases upon this subject have said that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination, nor is it to be tested by the prices that result from the combination; that combinations which lead directly to lower prices may be in restraint of trade against the consumer, and combinations which lead directly to higher prices may be in restraint of trade as against the producer. The Sherman Anti-Trust Act is not concerned with the price - it looks solely to competition; and that whatever combination has the direct and necessary effect of restricting competition is prohibited by the Act. The test as to whether or not there is an unlawful monopoly in restraint of trade is whether the combination has the power, or is organized for the purpose of controlling prices and suppressing competition. (50 A.L.R.1000). There does not have to be a combination of powerful utilities to restrain trade; the fixing of the price at which a product may be sold by an individual who alone serves the public with that product deprives the public of their right to free competition.

In relation to patents and copyrights the original belief was that the owners could fix the prices at which their products could be sold at retail as a power incidental to the monopoly granted by statute. (Strauss v. American Publishing Ass'n, 177 N.Y.473; Murphy v. Christian Press Ass'n, 38 A.D.426). But these decisions were upset by a long line of cases in the United States Supreme Court in which it was held that the power to fix prices was in restraint of trade and detrimental to the general welfare, and that no such power exists under the copyright statutes. (Bobbs-Merrill Co. v. Strauss, 210 U.S.339; Scribner v. Strauss, 210 U.S.352).

"Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement." (Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S.373). The owner of a trademark cannot control the price of the trademarked article in the hands of a dealer with whom he has no contractual relation (Ingersoll v. McColl, 204 Fed. 147), even though the dealer knows that the manufacturer sells only subject to a stipulation fixing the retail price. (Garst v. Hall & L.Co.,179 Mass.588)/

Since these decisions the manufacturer has used devious ways of avoiding them and of fixing prices by selling on consignment whereby the consignee is the agent of the manufacturer to sell the goods of which the manufacturer continues to be the owner. But this was too limited; price regulation right down to the consumer was more desirable to the producer. In a California case it was held that the maker of ground chocolate could control the price at which it could be sold at retail by printing a notice on the package that the maker sold it under an agreement that it would not be sold for less than 30¢ per pound package, and that by purchasing any retailer would be bound by the stipulation. (D.Ghirardelli Co. v. Hunsicker,164 Cal.

355, 128 Pac.1041). The opinion discussed the Dr. Miles Medical Co. case and distinguished it on the ground that that case involved a proprietary medicine on which there was a monopoly since no one else could supply the public with Dr. Miles' medicines. There was no monopoly involved in the California case. However, the court said in the Dr. Miles Medical Co. case (p.405), "Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales." In the light of this statement by the Supreme Court it appears that the Ghirardelli case goes pretty far in extending the power of the manufacturer.

The quotation given above from the opinion of Justice Hughes in the Dr. Miles Medical Co. case has given rise to legislation upon this subject in some of the states. All these statutes are substantially similar. The material parts of the Fair Trade Act of Illinois are as follows: "§1. No contract relating to the sale or resale of a commodity which bears,....the trademark, brand, or name of the producer or owner....which is in fair and open competition... shall be deemed in violation of any law of the State of Illinois by reason of ... provisions ... in such contract: 1. That the buyer will not resell such commodity except at the price stipulated by the vendor. 2. That the vendee ... require upon the sale of such commodity to another that such purchaser agree that he ... will not, in turn, resell except at the price stipulated by such producer or vendee." There are exemptions where the owner is selling out, or where the goods are damaged, or where they are sold by order of the court. "§2. Wilfully and knowingly advertising, ... or selling ... at less than the price stipulated in any contract ... whether the person so advertising ... or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Under this statute it has been held that a producer who sold to a wholesaler, stipulating the retail price, could enjoin the advertising and sale by a retailer at a price less than the stipulation between the producer and the wholesaler. (Old Dearborn Distrib. Co. v. Seagram-Distil.Corp., 81 L.Ed.130). This case does not go so far as the Ghirardelli case; here there is legislative sanction for binding the retailer by notice of the previous contract. In the Old Dearborn case the constitutionality of the Illinois statute was questioned. It was pointed out that a producer whose name or trademark appears on the commodity does not part with his entire interest by a sale of the commodity. The good will of his business and product goes along, but it is not for sale - it is merely loaned to the whlesaler or retailer - and because of this retained interest the producer may fix the price at which the commodity may be sold.

This same argument was presented to the court in other cases involving price fixing of copyrighted articles, etc., but was not considered to be controlling on the question and was consequently discarded. (Bobbs-Merrill Co. v. Strauss, 210 U.S.339; Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S.373).

It was contended that such a statute deprives the retailer of his property without due process of law. But accepting the argument of Justice Sutherland in the Old Dearborn case, that the manufacturer has a continued interest in a commodity after he has sold it, because his name or brand appears thereon, we readily admit the

constitutionality of the statute on this ground, for the retailer is selling the producer's good will which he has not bought and for which he has not paid.

The Legislature cannot ordinarily fix the price at which an owner may dispose of his property (Tyson Bros. v. Banton, 273 U.S. 418; Ribnik v. McBride, 277 U.S.350), nor may it delegate a power which it does not have. No doubt it may declare that private contracts fixing prices are valid, but it seems to go pretty far when it makes such contracts binding on one who merely deals in the product. He has not consented to be bound and it is rather difficult to see that by merely dealing in a branded commodity he has assented to the terms of a contract between other parties.

Section 2 of the Illinois statute is objectionable for another reason: there is apparently no provision for one who buys marked products without notice of the contract between the manufacturer and the wholesaler. Will he be bound by a notice that he receives after he has stocked up his store with the commodity in question? Was he not entitled to rely on an honest belief that he could sell his property at his own price? Yet from a reading of the statute the notice need come only before the "Advertising ... or selling ... at less than the price stipulated" to bind him.

Such a statute would not deny equal protection of the laws, fo there is a reasonable basis for the classification. It can hardly be questioned but that there is a difference between goods that are trademarked or which bear the name of the manufacturer, and those which are not so marked. Goods are bought by their trade name. The trademark and its associated good will are property, and to prevent injury to it is a proper subject for legislation. (Old Dearborn Distrib. Co. v. Seagram Distil.Corp., supra).

New York adopted a statute, in the same terms as the Illinois statute, which came before the Court of Appeals for consideration in Doubleday, Doran & Co. v. Macy & Co.(269 N.Y.272). The Court place the same interpretation upon the statute as was placed upon the Illinois statute by the Supreme Court of the United States, but the New York Court held that this was price fixing by the Legislature and was, therefore, unconstitutional. Also that contracts could no be made binding upon persons not parties to the contract by legislative enactment. The holding of the Supreme Court in the Old Dearborn case seems to indicate that it might have reversed the Doubleday Doran case if it had been carried to that Court, but there is a difference which might have caused the Supreme Court to affirm the Court of Appeals holding in the New York case. The Court of Appeals was dealing with a copyrighted article which may not have bee in fair and open competition, while the Illinois case did not involve such an article. The New York case follows the authorities, but the Illinois case is a departure therefrom.

We need not accept the argument of the Old Dearborn case blindly for it is well supported by reason. It is general knowledg that price-cutting is very injurious to the product the price of which is so cut. Some dealers will cut the price and take a loss on one article to increase the number of sales in their stores. This soon forces the product whose price has been cut, off of the market. Other dealers cannot compete on the article so cut and consequently they will not buy it. It is difficult to see, nevertheless, why the producer could not adequately protect himself by contract and an action for damages in case of a breach, and at the

same time preserve the right of the public to free competition.

It may be said that the producer will not place a prohibitive price upon his product, since it is in fair and open competition. Still the power to fix prices is there and shadows of monopoly are threatening in the background. It is then but a step to the monopolies which have ever been considered to be detrimental to the general welfare.

Assuming the constitutionality of such statutes and that they are a proper subject for state legislation, although it may be quite a violent departure from some long-standing concepts, the Supreme Court will not consider the wisdom of the legislation unless it is a flagrant abuse of legislative power. (Radice v. New York, 264 U.S.292). On the price fixing question there is a difference of opinion; the wisdom of such statutes is fairly debatable and the court will carry into effect the opinion of the state legislatures.

Speaking for the Court in the Dr. Miles Medical Co. case, Justice Hughes stated the rule for testing the validity of price fixing statutes or contracts as follows: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy ... Public welfare is first considered and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained."

Measured by this rule such contracts as are authorized by the Fair Trade Act of Illinois have, heretofore, been considered invalid as in restraint of trade. (Dr. Miles Medical Co. v. Park & Sons, supra). The state legislatures have no power themselves to fix prices. (Tyson Bros. v. Banton, supra; Ribnik v. McBride, supra). Federal legislation for this purpose is held to be beyond the power of the Federal Government. But now we have N.R.A. by the states upheld because it is said to be within the powers of the states and because the wisdom of the statute is not reviewable by the Supreme Court.

We have then a new declaration of our public policy which "has been substantially modified in adptation to modern conditions. It is no longer our policy that the public is entitled to whatever advantage may be derived from competition. The public may have the benefit of the competition among the producers but is not, under the present interpretation, entitled to the advantage derived from competition among wholesalers and retailers.

NEIL HESSON, JR.

CONSTITUTIONAL LAW - VALIDITY OF THE STATUTE ABOLISHING CAUSES OF ACTION FOR ALIENATION OF AFFECTIONS, CRIMINAL CONVERSATION, SEDUCTION, AND FOR BREACH OF PROMISE TO MARRY

Insofar as it purports to destroy the theretofore existing cause of action for breach of promise to marry, Art. 2-a of the Civil Practice Act (added by Laws 1935, Chap.263) has been upheld by the Court of Appeals in the recent case of Fearon v. Treanor (272 N.Y.268). Confining its decision to the cause of action alleged, the Court ruled that the power of the Legislature over marriage is plenary, and that inasmuch as such actions have resulted in injury to the marriage institution and thereby interfered with the general welfare, it was within the competency of the law-making bod to abolish them.

In considering the soundness of the determination there are two things to be kept in mind, namely, the evil which it was sought to abolish, and the means used to achieve this end. The abuses surrounding the action for breach of promise to marry are legion. A contract to marry is not within the Statute of Frauds (Pers. Prop. Law §31 subd.3) but may be proved by acts and declarations of the parties from which an intent to marry can be inferred (Homan v. Earle, 53 N.Y.267). The avenues to blackmail and extortion are thus left wide open. It requires but little imagination, albeit some ingenuity, for an unscrupulous and designing plaintiff to spell out a promise to wed from conduct intended only as devoted attention. And if she beattractive it requires even less than that for the average jury to believe her. Furthermore, if the defendant impelled by sexual fascination, has indulged in flowery prose, his case is hopeless, for letters are the boon of every breach of promise lawyer. It is no defense to the action that plaintiff has no affection for the defendant (Coolidge v. Neat, 129 Mass.146, contra Parks v. Marshall, 14 S.W. (2d) 590; see 62 A.L.R.746), nor could it be a defense that defendant has no affection for the plaintiff, for that would be equivalent to saying that defendant might recede from a contract because disinclined to fulfill it. Notwithstanding mutual dislike, therefore, a recovery may be allowed upon a contract presumably founded on something exactly the opposite. The difficulty arises from attempting to apply the hard and fast rules applicable to commercial contracts, to one fundamentally and essentially different therefrom. And notwithstanding that such application is invariably made, the courts are ever quick to oppose any contention that such contracts are commercial contracts (Lewis v. Tapman, 45 Atl.459).

By far the gravest evil lies in the damages recoverable. The damages are in the sound discretion of the jury (Southard v. Rexford, 6 Cow.254) and the jury, being proverbially generous with the money of other people in this class of cases, recognizes only two bases of recovery - plaintiff's beauty and defendant's ability to pay. The original theory of the action, and one reason for holding that it would lie, was the idea that a woman gains materially through marriage (Wrightman v. Coates, 15 Mass.1). In one of the earliest cases holding that the action was maintainable, it was

stated per Atkins, J.: "Marriage to a woman especially, is an advancement or preferment.... Loss of matrimony is a temporal loss." (Holcroft v. Dickenson, 124 Eng. Rep. 933 (1672)). Not only have modern economic conditions virtually exploded this theory, but it would seem that the damages should in some manner approximate this loss, for after all what is lost by a breach of the contract are the incidents of a certain social status. How different is the actual practice. If the plaintiff be attractive, the jury generally give her heavy damages; if she be unattractive they often have a sneaking sympathy for the man. She who has her fortune all before her is handsomely recompensed, while her plainer sister, who could scarcely afford to lose the best years of her life, is sent away empty-handed. The damages include not only expenses incurred in reliance upon the promise, but also losses caused by such delightfully vague things as wounded feelings, anxiety of mind, injured pride, and blighted affections. (Brisack v. King, 199 A.D.213). And exemplary or punitive damages may also be awarded (Johnson v. Jenkins, 24 N.Y.252), based presumably on the theory that every defendant who may refuse to perform his promise is a scoundrel, a villain, and a rake. As might well be supposed, verdicts flowing from such notions are not small. In Woodhouse v. Woodhouse (130 Atl. 758) the trial judge reduced the verdict from $425,000 to $125,000, and verdicts of $15,000 are not uncommon.

Lastly, there is the social unwisdom of penalizing a party who is unwilling to marry. "The marriage state ought not to be lightly entered into; it involves the profoundest interests of human life, transmitting its complex influences direct to posterity ..... From such a standpoint we view the marriage engagement substantially as a period of probation for both parties - their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and of temperament, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off." (2 Schouler on Domestic Relations (6th) §1302). The consequences to the party who takes the initiative in this respect require no demonstration.

From this discussion it is manifest that ample ground existed for a legislative declaration of policy; but it by no means necessarily follows that the method used to effectuate it is therefore valid. In Hanfgarn v. Mark (248 A.D.325), which declared this same statute (Art. 2-a) unconstitutional insofar as it abolished the causes of action for criminal conversation and alienation of affections, it was said: "The Legislature undoubtedly has power to change or alter the common law rules of evidence and method of procedure and to regulate the practice and procedure in actions brought in our courts, or even to abrogate certain rules of evidence or certain matters of practice and procedure where such rules or practice have become obsolete, or otherwise, in the interests of the due administration of justice. But it is one thing to regulate, change, or alter methods of procedure in actions, and quite another thing to abolish entirely a right of action theretofore existing at common law. It is unquestionably the general rule that no person has any property, any vested interest, in any rule of the common law (Munn v. Ill., 94 U.S.113; Brown v. New Jersey, 175 U.S.172). If it were otherwise; if there were a vested interest in common law actions and modes of procedure, then "The procedure of the first half of the Seventeenth Century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment." (Twining v. New

Jersey, 211 U.S.78, 101). In the case last cited, a law of New Jersey, which permitted the jury to draw an unfavorable inference from the failure of a defendant to testify in his own behalf, was held valid. And in Hurtado v. California (110 U.S.516) prosecution by information instead of by indictment was deemed constitutional. Similarly, in New York Central Railroad v. White,(243 U.S.188) the New York Workmen's Compensation Law, which abolished the common law defenses of assumption of risk and the fellow-servant rule, was upheld. Again, a law of Connecticutt providing that no person carried gratuitously as a guest in an automobile could recover from the owner or operator for injuries caused by its negligent operation, was declared constitutional. (Silver v. Silver, 280 U.S.117). And in Lennon v. N.Y.,(55 N.Y.361) it was determined that plaintiff had no such constitutional right to the aid of a court of equity as would prevent the Legislature from depriving him of the equitable remedy to remove the apparent lien of a void assessment. However, in all these cases there was some substitute for the remedy which was taken away: the employer was still to be liable to his employee for injuries sustained in the course of employment, and that too without fault; the owner or operator was to be liable for gross or wilfull negligence; equity would still restrain enforcement of the apparent lien by a sale of plaintiff's property. It is thus seen that none of these decisions involved the precise point, namely whether the right of action could be abolished entirely with no substitute in its place.

The question thus resolves itself into a determination whether causes of action to enforce rights which existed at common law can be entirely destroyed. If they cannot be so abolished, then it must be because such rights are natural rights of man, which is to give a finality to the common law in this respect that it does not invariably enjoy. (See Pound, Spirit of the Common Law p.95). That is to say, it identifies common law rights with the natural rights of man. In addition, it renders the common law more sacred and immutable than the general welfare of the whole people. On the other hand, if they can be so destroyed whenever there are abuses of whatever nature in connection therewith, then property rights are placed upon an uncertain and precarious basis, depending for their existence upon legislative whim. No one would seriously contend, for example, that the Legislature could abolish all remedies for the recovery of property. Perhaps the distinction may be found to lie in the "broad difference between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute." (Truax v. Corrigan,257 U.S.312). If this be so, then the conclusion would seem to follow that the case of Hanfgarn v. Mark (supra) is correct in its holding, and that Fearon v. Treanor is equally correct in its holding. However this may be, marriage and everything relating thereto has always been deemed to be peculiarly subject to legislative control (Maynard v. Hill, 125 U.S.190; Hogan v. Curtin, 88 N.Y.162). Consequ ntly the decision in Fearon v. Treanor (supra) may be placed upon this broad ground alone.

CAREY DEAN WINNE

N O T E S

SEPARATION - COUNTERCLAIM FOR DIVORCE BY ONE WHO HAS PREVIOUSLY PROCURED DIVORCE, VOID HERE.- "Where an action for divorce or separation is brought by either husband or wife, a cause of action for divorce or separation against the plaintiff and in favor of the defendant may be interposed in connection with a denial of the material allegations of the complaint, as a counterclaim." (Civil Practice Act §1168).

From decisions of the courts, including in particular for present consideration those in the cases of Starbuck v. Starbuck (173 N.Y.503); Schneider v. Schneider 232 App. Div. 71); and Brown v. Brown (242 App. Div. 33, aff'd 266 N.Y.532), has aris n the general principle that a party may not be heard to impeach a decree or judgment which he has procured to be entered. Thus, in the Starbuck case the widow could not recover dower in real estate of which her husband died seized in New York, and which he acquired after she had obtained a divorce in Massachusetts, upon the ground of extreme cruelty, in which action he neither appeared personally nor by attorney.

The question of law in the recent case of Stevens v. Stevens (248 App. Div. 344) involved the right of the defendant husband to interpose a counterclaim for divorce in the face of the general principle above stated.

The parties were residents of New York; they separated; the plaintiff wife asserts that the defendant abandoned her; the defendant alleges he left because of her misconduct. He obtained a Nevada divorce on the ground of cruel and inhuman treatment; the wife did not appear. Now she sues for a separation upon the ground of abandonment and non-support. Plaintiff's motion to dismiss the counterclaim for absolute divorce was granted on the ground that the defendant was estopped. The Appellate Division, First Department, two Judges dissenting, reversed the order.

The Court concedes that the defendant could notmaintain -as plaintiff- an action against the plaintiff herein based on the facts alleged in the counterclaim, but points out that the defendant did not start this litigation; that as the wife sues, thereby treating the Nevada decree as void and asserting a valid subsisting marriage, she impliedly waives the right which the defendants in the other three cases had to claim that the plaintiffs therein were estopped.

The dissent argues that defendant is seeking affirmative relief and is impeaching the Nevada decree. While maintaining that the counterclaim was properly dismissed,they urge that under §1163 of the Civil Practice Act, providing that "The defendant in an action for separation.....may set up, in justification, the misconduct of the plaintiff; and if that defence is established.....the defendant is entitled to judgment," the defendant can interpose plaintiff's adultery as a defense. The marriage, however, would still subsist; in New York these litigants would still be husband and wife, the defendant being under no duty to support the plaintiff

To say that this case is distinguishable by the simple fact that the defendant did not instigate the litigation, and assuming proof of the adultery could be made, is to afford the means whereby a complete dissolution of this marriage could be effected. Thenceforward, at least one instance in which the parties are considered as husband and wife in one jurisdiction and as divorced in another would be removed. Speaking abstractly," as the Court says, "an adulteress should not be permitted to flaunt her infidelity under the name of her husband."

J. T. G.

* * * *

WORKMEN'S COMPENSATION - MARITIME TRANSPORTATION- NON-MARITIME CONTRACTS.- In the recent case of Carlin Construction Co. v. Heaney, 81 L.Ed.16 we have another decision added to a long line of similar decisions in which the court has had to decide between the applicability of maritime law and that of local law.

In this case the claimant Heaney was an employee of the Carlin Construction Co., which was engaged in constructing a building on Riker's Island located in the East River. The appellant's contract provided that the contractor must assume responsibility for the transportation from the mainland to the island, of men and materials for all work done under the contract. The Construction Co. made arrangements with the owner of a steamboat for this transportation.

Heaney while in the employ of the Carlin Construction Co. boarded the boat one morning and after the boat left the dock on its way to the island an explosion occurred, injuring the claimant. He subsequently filed a claim under the New York Workmen's Compensation Law on account of such injuries. The United States Supreme Court affirmed the award of the State Compensation Board on the ground that the claimant was suing on his contract which was not a maritime contract. The court said: "The contract had no direct relation to navigation; to enforce it against the parties before us will not materially interfere with the uniformity of any maritime rule."

The case of Spencer Kellogg & Sons v. Hicks, (285 U.S.502), was very similar in facts and was relied upon by the appellant as sustaining in its contention that Heaney's rights should be enforced in admiralty jurisdiction and not under the State Compensation Law. In that case the employer was transporting its men to work over navigable waters in a boat owned and operated by the employer. The boat sank due to the negligence of the employer's servants. The work was being done in New Jersey and it was held that the claimants could not recover under the New Jersey Compensation Act as the claims came under admiralty jurisdiction.

The court distinguished the two cases by saying: "There the vessel's owner was held liable for injuries received on navigable waters in consequence of the master's negligence. The respondent here seeks to enforce a contract of employment which had no direct relation to navigation, business, or commerce of the sea."

To our mind it is difficult to distinguish the two cases in principle. The claimants in both cases were admittedly in the course of their employment when injured; both were injuired on navigable waters while employed under contracts not of a maritime nature: and both sought to recover under the compensation law which was impliedly made a part of their contracts of employment. The only possible factual difference was that the boat in the Kellogg case was owned by the employer while in the Carlin case it was owned by another. But the Carlin Co. had agreed to be liable for the transportation of the men and hired the boat as its agency for taking care of the transportation.

In general, from an examination of the cases involving close questions between maritime and local jurisdiction it is impossible to deduce any definite principle. Several of the cases more or less stand alone. There is, however, an evident trend to give employees the benefit of State compensation acts. The present Carlin case to our mind is in furtherance of this trend. Although it is somewhat out of line with precedent it is strictly in accord with reason and justice, as there is no just reason why an employee who is engaged in the performance of a non-maritime contract and who is compelled to be transported over navigable waters in the course of his employment should be denied the benefits of a State compensation act simply because he is injured on navigable waters.

E. S. D.

* * * *

CONTRACTS - ILLEGALITY - REPEAL OF STATUTE WHICH MADE CONSIDERATION ILLEGAL.- The recent case of Lido Corp. v. Vogel, (161 Misc.48) holding that a vendor of intoxicating liquor can now recover the purchase price even though the contract and delivery were both made while the National Prohibition Act was in force, may seem at first glance to be a startling innovation in our contract law, inasmuch as the contract when made was clearly illegal and in violation of our public policy. (Grogan v. Hiram Walker & Sons, 259 U.S.80). On a closer examination of the precedents and established law, it will be seen, however, that the decision is far from an innovation and is indeed the only decision to which the court could have come without violating the principles of stare decisis.

It is well established that when a statute is repealed, all rights, liabilities, and defenses based thereon are lost unless they have become vested or there is a saving clause contained in the repealing statute. (Washburn v. Franklin, 35 Barb. 599; Key v. Goodwin, 4 M.& P. 341; Butler v. Palmer, 1 Hill 334; U.S.v.Chambers, 291 U.S.217). The extent to which this has been carried is well illustrated by the Chambers case (supra). In that case, the defendant on June 5, 1933 pleaded guilty to illegal possession of liquor. Sentence was deferred. On December 5, 1933, the Eighteenth Amendment was repealed by the Twenty-first Amendment. The next day, Chambers was brought up for sentence and moved in arrest of judgment. The Supreme Court held that the motion was properly granted and that there was no longer a law under which the defendant could be sentenced.

That the contracts for the sale of liquor were merely malum prohibitum and not malum in se is obvious. Sales of intoxicants were never so shocking to the general public that they could be called wrong except for the statute. (Matter of Birner v. Santa Lucia Wineries, 155 Misc. 725; Block v. Frankfort Distilleries, 247 App.Div. 864).

The statute merely afforded (so far as contracts are concerned) a defense of illegality. Such defenses are clearly lost by repeal of the statute affording it. In Curtis v. Leavitt, (15 N.Y.9) the defendant corporation borrowed money at a usurious rate of interest. Subsequently, the usury statutes were changed and the defense denied to corporations. In holding the defense of usury to be of no avail, Judge Comstalk said that by the repeal, such contract was left "in full force according to its terms; and such an act is liable to no constitutional objection."

The cases of Washburn v. Franklin (supra) and Central Bank v. Empire Stone Dressing Co. (26 Barb. 23) are in point. The former held that a contract for purchase of certain stocks, illegal when made, was validated by repeal of the statutes against it. The latter upheld a similar contract involving the issuance of illegal bank notes. The syllabus in the Central Bank case (supra) sums up the entire situation thus: "Contracts made while the prohibitory law was in force, whose consideration was morally good as between the parties, are therefore now (that the prohibitory law has been repealed) without the legal impediment of being contrary to legally established public policy, and are valid."

M.M.L.L.

* * * *

BILLS AND NOTES - ENDORSEMENTS IN TRUST.- The case of Coral Gables, Inc. v. Jones (187 Atl.434) seems to further restrict the scope of the language necessary to constitute a restrictive endorsement. The note in this case was given to the Coral Gables Corporation as part of the purchase price of a tract of land. The Corporation gave a mortgage covering the property under the contract of sale as well as other property. The mortgage was in the form of a deed in trust to the Biscayne Trust Company and A. J. Orme as trustees and the note here in suit was pledged in the mortgage. The note was endorsed, "Coral Gables Corporation by F. W. Webster, Vice-President." Plaintiff, a corporation formed by bondholder creditors of the Coral Gables Corporation, is a transferee of the note and upon this suit the defendant claims the plaintiff did not get a good title since the endorsement by the Coral Gables Corporation was restrictive, being in fact made to a trustee. The court refused to accept the defendant's contention, holding that the endorsement being in blank, was not restrictive. The court in construing the law of the place of contract -Florida - asserted that an endorsement to a person "as trustee is not a restrictive endorsement. To have that effect the endorsement must vest title in the endorsee "in trust for or to the use of some other person." (Knight v. Equitable Bank & Trust Co., 102 Fla. 453).

Thus, although the Florida statute regarding restrictive endorsements is identical with that of New York, the courts of the two States arrive at different conclusions. The New York courts have held that a general endorsement is restrictive when the draft containing the endorsement is accompanied by a letter stating that the draft is forwarded for collection. (Bank of America v. Waydell, 187 N.Y.115). The New York courts are inclined to give a more liberal interpretation to the term "restrictive endorsement" and thus allow evidence or facts de hors the instrument itself to prove that the endorsement is not in blank as appears on its face. It appears from this decision, however, that effect will be given to the restriction only when the instrument has not come into the hands of a holder for value and without notice. It would seem that in view of the nature of a negotiable instrument, the rule adopted by the Pennsylvania court in the Coral Gables case (supra) is the more practical, if limited to cases where the dneorsee is a bona fide holder.

A case which tends toward the New York rule was decided by the Arkansas court in J.L.Johnston v. A.L.Schnabaum (109 S.W.1163). The facts of this case, however, somewhat modify its strength as a support for the Bank of America v. Waydell (supra). There the endorsement was, "Previous endorsements guaranteed. Pay to the order of any bank or banker. Bank of Maynard, by J.L.Talbert, Cashier." The evidence clearly indicated that the note was sent for collection only. The court decided that under the weight of authorities parol evidence is sometimes admissible to explain or qualify an unrestricted endorsement. The court, however, qualifies its decision in this case, since it was shown that the transferee had knowledge of the nature of the endorsement and, in addition, it reads "to any bank or banker," which should be sufficient to put a person on notice or to indicate that the endorsement was for collection only.

It cannot be said that the law in the Coral Gables case is entirely opposed to the New York and Arkansas decisions since it does not appear whether or not the plaintiff, endorsee, is a bona fide holder for value. If so, then the collateral facts would not be admissible to show the restrictive nature of the endorsement even under the New York rule. The court, however, does not restrict its decision to a bona fide holder and perhaps the result would be the same even between the immediate parties. Such a holding would seem to be inequitable and lay a severe penalty upon an endorser failing to use due care in the type of endorsement selected.

D. J. N.

* * * *

HOMICIDE - PROXIMATE CAUSE - NON-DANGEROUS WOUNDS.- The troublesome question of an indirect cause of death being sufficiently proximate to establish criminal liability received a striking and apparently final answer in the case of People v. Parody, 248 A.D.269. In this case, the Appellate Division has gone to the fullest possible extent of the rules of proximate cause and has upheld the conviction of a drunken driver on a charge of manslaughter, even though it is conceded that death was the result of a surgical operation and would definitely not have occurred had not the operation been performed.

A brief survey of the facts will indicate that the ruling was not as revolutionary as might appear at first glance. The case, however, will serve as a distinct warning to future offenders that Sections 1052 and 1042 of the Penal Law will receive hitherto unsuspected strength in enforcement in the war against reckless and drunken driving.

On the 14th of November, 1935, George C. Lavanway was standing behind a delivery truck parked on the righthand side of the street in Watertown. The defendant was driving at high speed up the street. Without warning, his car swerved toward the curb, crushing Lavanway against the truck. The defendant staggered from his car and disappeared. That night he surrendered to the police with the story that he had been so intoxicated that he couldn't remember what happened.

In the meantime, Lavanway's legs had both been broken above the knees. His condition was serious but persistent expert medical and surgical care brought him out of the danger zone. As time progressed however, and while Lavanway was recuperating from the immediate effects of the accident, it became apparent that the bones in the patient's legs could not be brought into apposition. The situation resolved itself into the question as to the necessity of an operation not to save the patient's life, but to restore the use of his legs. The operation was agreed upon and was performed. At first it appeared that it had been successful, but complications set in and Lavanway died within a few hours.

It is now the contention of the defendant that as Lavanway would not have died had it not been for the operation, and as the operation was not necessary to save his life, the case of manslaughter has been defeated by the intervention of said operation. The court, however, hewed to the ancient fundamental principle that a man is responsible for the natural and "foreseeable" results of his act. It seems quite obvious that one who runs another down in a speeding automobile might have at least a faint suspicion that intricate sugrical operations would follow as a possible result.

The authority for the general tendency of the holding is old and well established. In People v. Kane, 213 N.Y.260, the subject is discussed in its application to a felonious and intentional assault. There it was said: "If a felonious assault is operative as a cause of death, the casual co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for homicide. The case at hand is, of course, not precisely in point. But it does give at least some modern authority for a holding that is as basically reasonable as it is necessary in the modern day of "week-end death tolls," and "holiday casualties." Even were there no precedent, fundamental justice must, of necessity, place the risk of penalty upon a defendant such as this. Having crippled his victim, the guilty must gamble on the operation to restore the use of that victim's legs, regardless of the immediate issue of life or death.

M. S.

* * * *

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THE LAW OF SURETYSHIP AS TO NEGOTIABLE INSTRUMENTS

THE UNIFORM NEGOTIABLE INSTRUMENTS ACT

The law of suretyship recognizes certain acts which will discharge the surety from his obligation to the creditor. An alteration of the principal contract, a release, waste, or dissipation of collateral security, and an extension of time to the principal debtor without the surety's consent are some of the acts deemed prejudicial to the surety so as to release him from further obligation.

Prior to the Uniform Negotiable Instruments Law, these and other acts were uniformly recognized as discharging the surety, or one standing in a similar relation. Thus a mortgagor was regarded as a surety to the grantee of the mortgaged premises who assumed the debt, and the rules of suretyship applied to release him when his rights were prejudiced. So,an extension of time to the grantee discharged the mortgagor-surety, whether the liability sought to be enforced was a general indebtedness or liability on a negotiable instrument.

Similarly, where an accommodation maker was sued on the note, he could give parol evidence to show that he was in reality a surety and that the payee knew of this relation to the accommodated party, who might be a co-maker or appear merely as an endorser. Such knowledge by the payee imposed on him the duty of equitable conduct towards the surety, and he was obliged to do no act prejudicial to the surety. This knowledge of the fact of suretyship, whether before or after taking the paper, could be shown by parol, although forms or appearances suggested that the surety was principal.

But since the enactment of the Uniform Negotiable Instruments Law, there has been dispute as to its effect on the laws of suretyship applicable to negotiable instruments and whether surety rules still apply to negotiable instruments. The effect of an extension of time has been the chief subject of discussion but the holdings are broad enough to include other suretyship defenses. The majority opinion is that under the Negotiable Instruments Law, an extension of time does not release the accommodation party to a note or a mortgagor-surety.(Cellars v. Meachem ((Ore.) 89 Pac.426; Vanderford v. Farmers Bank ((Md.) 36 Atl.47; Richards v. Market Exch.Bank Co. ((Ohio) 90 N.E.1000; Peter v. Finzo ((Neb.) 217 N.W.612; Vernon Center Bank v. Mangelsen ((Minn.) 208 N.W.186. The exact point has not been decided in New York and there is little to indicate which view our courst will take. (But see National Citizens Bank v. Topletz, 81 A.D.593, and 178 N.Y.464; Building & Engineering Co. v. Northern Bank, 206 N.Y.400).

The majority view has been severely criticized by legal writers and by the minority jurisdictions, who feel that the equitable doctrines of suretyship were not intended to be overruled by the framers of the Negotiable Instruments Law.

Some majority jurisdictions make a distinction, holding that when the original payee sues, he is not a holder in due course and thus cannot claim that the Act prevents the release of the surety. This is because §58 states that one not a holder in due course is subject to the same defenses as if the instrument were non-negotiable (Fullerton Lumber Co. v. Snouffer (Iowa) N.W.50; Strother v. Wil-

kinson (Okla.), 216 Pac.436; Hardin Trust Co. v. Wollard (Nebr.) 228 N.W.866; See also list of cases in 48 A.L.R.719).

The cases in which the maker of a note became surety by transfer of the mortgaged property also lack uniformity, both majority and minority views being applied. The maker was not released in Continental Mutual Savings Bank v. Elliott((Wash.), 6 Pac. 2d 638), but in Zastrow v. Knight ((S.D.)229 N.W.925), the minority view was applied and the mortgagor released.

The case of Mortgage Guarantee Co. v. Chotiner (64 Pac. 2d 138) recently decided in California, discusses the problem anew and although admitting the great and justifiable conflict of opinion, upholds the majority view that a mortgagor-surety is not discharged by an extension of time to his grantee. In this case, the Chotiner Building Corporation executed a note which the defendant guarateed. The note was secured by a mortgage on realty which was later conveyed to Johnson and by him to Duhig, each taking the land subject to the mortgage. The payee of the note transferred it in due course to the plaintiff, who made binding extension agreements with Johnson and Duhig, without the knowledge or consent of the maker or defendant guarantor. The defendant now claims that he is not liable on his guaranty because of the extension agreement which automatically released the principal debtor.

The court first notes that an extension which will discharge the guarantor must be made by the creditor with the principal debtor. It is well established that if the creditor makes an agreement to extend the time of payment with a third person not a party to the instrument, it does not release a guarantor, because, "it does not alter the terms of the note as between the creditor and the principal debtor, hence the guarantor loses none of the rights secured to him as against either the creditor or the principal because of the extension. Therefore, if there is in this case, no alteration of the obligation of the maker of the note by reason of the extensions to the grantees of the hypothecated realty, the guarantors are not released." (Mortgage Co. v. Chotiner, supra, at page 140; Cf. Kaufman v. Penn.Mutual Life Ins.Co., 64 Fed. (2d) 160; Wright v. Independence Nat. Bank, 32 S.E.459).

There is no trouble as regards endorsers, since the Act affirmed the common law rule permitting a discharge by an extension of time. (N.I.L.§120 Par.6). The main difficulty is in reference to parties primarily liable. Section 192 states that a person primarily liable on an instrument is one who by its terms is absolutely required to pay the same. All other parties are secondarily liable. Thus, since an accommodation maker is absolutely required to pay the instrument, by its terms, he is primarily liable. By the same reasoning, a surety is primarily liable.

By §29 an accommodation party is liable on the instrument to a holder for value notwithstanding the holder at the time of taking the instrument knew him to be only an accommodation party. Where two makers appear on the face of the note and one writes "surety" after his name, this does not alter his primary liability on the note but is held merely to explain the relation between the two parties. Cellars v. Meachem (supra). Thus the Negotiable Instruments Law prevents the accommodation party who appears primarily liable on the face of the instrument from showing by parol, his true character as one only secondarily liable.

But nowhere does the Negotiable Instruments Law provide for the discharge of parties primarily liable, nor does it mention sureties. It states how one secondarily liable may be discharged in §120:

(1) By any act which discharges the instrument;
(2) By the intentional cancellation of his signature by the holder;
(3) By the discharge of a prior party;
(4) By a valid tender of payment made by a prior party;
(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
(6) By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

The act provides in §119 for the discharge of the instrument itself:

(1) By payment in due course by or on behalf of the principal debtor;
(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
(3) By the intentional cancellation thereof by the holder;
(4) By any other act which will discharge a simple contract for the payment of money;
(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

It is by its interpretation of these two sections that the majority concludes that the Negotiable Instruments Law destroys the surety's defenses. "The majority rule is grounded on the legislative intent to supersede the general law of suretyship as to negotiable instruments by the adoption of the Negotiable Instruments Law. This intention of the Legislature is arrived at by the application to §§119 and 120 of the Uniform Act, of the doctrine of expressio unius est exclusio alterious." (Mortgage Co. v. Chotiner supra, at page 141).

The majority believes that §119 covering the discharge of the instrument, also covers the discharge of primary parties, the greater including the less. Sections 119 and 120 together would thus cover the whole field of the discharge of parties primarily and secondarily liable. The enumerated methods of discharge are deemed exclusive, for since the Act does not provide for the discharge of the instrument by any extension of time, it is argued that a party primarily liable is not discharged by an extension of time. (See discussion and cases noted in 48 A.L.R.723). So, the surety and accommodation maker being primary parties, are held to be discharged only in the methods specified in §119 for the discharge of the instrument itself.

It is further argued that the inclusion of some suretyship defenses under §120, relative to secondary parties, shows a clear intent to abrogate those defenses as to one who appears on the face of the paper as primarily liable. If the Legislature intended to include extension of time under §119, there would be no need to repeat it in §120 since it would automatically be included under §120 (1) as an act which would discharge the instrument. The

cases supporting both viewpoints are collected and discussed in more detail in 10 L.R.A.N.S.129, 26 L.R.A.N.S.99, 48 A.L.R.715, 65 A.L.R.1425, 72 A.L.R.389.

The majority view is severely and ably criticized by most writers on the subject. (See 30 Harvard Law Review 157, 17 Minnesota Law Review 220, 11 Law Notes 105, 10 Tulane Law Review 139, 12 Minnesota Law Review 668, 14 Oregon Law Review 273, 13 Marquette Law Review 122, 59 University of Pennsylvania Law Review 532, 10 Illinois Law Review 277, 38 Harvard Law Review 144, 14 Harvard Law Review 241).

"It is submitted that the decisions in these cases are at variance with well established doctrines of suretyship and are not required by the provisions of §§119 and 120. The discharge of the party who, though primarily liable, is known to the holder to be a surety, by giving time to the principal seems to be covered by §119 (4). But if this is not so, then, since the discharge of the surety-maker or the surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this should be regarded as an omitted case and therefore, to be governed by the law merchant under §196." Brannon, The Negotiable Instruments Law, 5th Ed., p.884. Section 196 says, "In any case not provided for in this Act, the rules of the law merchant shall govern."

Most writers and certain minority jurisdictions agree with Professor Brannon that the situation is either covered by §119 (4), or is an omitted case to be governed by the law merchant under §196. (Citizens Bank of Coleman v. Rosenwald (S.D.) 245 N.W.264). Professor Street points out that the contract of suretyship is a simple contract, and an extension of time has long been held to be an act which discharged this contract. This was therefore meant to be covered by §119 (4) as were other unforeseen contingencies. 11 Law Notes 105.

In view of §196, the application of the doctrine expressio unius est exclusio alterious does violence to the plain language of the Statute. It supports a purely technical and unfounded interpretation of §§119 and 120. The inclusion of §196 demonstrates that it was not intended to be a complete codification of the subject, but this is the major premise of the majority. The fallacy of this view is apparent after an examination of the Act; §196 would be anamolous in an exclusive codification.

The majority has answered that the reference to the law merchant excludes suretyship defenses because they are part of the common law and unknown to the law merchant. But their premise is incorrect, for the common law and the law merchant although arising separately, were incorporated into one system before the Negotiable Instruments Act. And even if they were separate at the time of the Act, the law merchant was replete with recognition of suretyship matters. The topic is elaborated in 30 Harvard Law Review 141, where it is pointed out that the rules for the release of a surety and of an accommodation party are founded in equity. Suretyship never was part of the law of negotiable instruments. The failure to mention suretyship in a codification of the law of negotiable instruments thus cannot be said to exclude suretyship from negotiable instruments.

The majority urges that to secure uniformity, the Act must be construed as far as possible without reference to rules of law not expressed therein. (Vanderford v. Farmers Bank (supra); Graham v. Shepard, 189 S.W.867). But even if the rules of suretyship are applied, as well they may be by the very terms of the Act itself as noted above, there would be no actual impairment of negotiability. Although the Act is intended to bring uniformity into transactions by making the instrument itself express the obligation of each party, that purpose has no effect on the collateral contract of suretyship, nor on the equities arising from the holder's knowledge and disregard of such contract.

The majority says that one who signs as a primary party cannot complain if he is treated as being in fact what he appears to be on the face of the paper. That is to say that the Act makes every party liable in accord with the strict terms of the instrument without regard for the equities existing outside the instrument between the parties. It is to ignore the distinction between rights defined by the terms of the instrument and equities which may nevertheless attach by arising outside it, fromthe relation of principal and surety interest. The majority would have it that the Act, which makes no mention of suretyship but is meant to define only what liabilities arise from the signatures to the instrument, intends to prevent any incident of suretyship from attaching to a negotiable instrument. Were this so, the Act would destroy equities beyond its scope, and with which it did not profess to deal. When a general surety relation arises in connection with a negotiable instrument it should be immaterial how the names of the principal debtor and surety appear on the face of the instrument. The surety's rights do not depend on contract but on equities arising from circumstances outside the contract. His obligation on the instrument to the creditor has nothing to do with his equitable rights against the accommodated party. When the creditor disregards those equities so that the accommodation party is entitled to be discharged under the rules of suretyship, to deprive him of this right by a strict interpretation of the Act is unnecessarily harsh and unjustified. The Negotiable Instruments Law can be fairly applied without such an interpretation. It is impossible for an act like this to include all the rules of suretyship save by reference. Thus §§119 (4) and 196 must be given effect.

Professor Street remarks that it is wrong to expect that the Legislature forsaw all possible contingencies and thus meant to exclu e the defense of discharge by extension of time by failing to mention it. He explains that the draftsman of the Act was betrayed by his deeply imbedded notion that the surety's obligation is secondary when he is liable at all. It was therefore natural to specify it under §120 without recalling the remote provision of the Statute whose definition of a party primarily liable includes a surety. (11 Law Notes 105).

Professor Ames declares there is no reason for inserting the doctrines of suretyship expressed in §§120 (5) and 120(6), in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance. (14 Harvard Law Rev.254). The application of familiar rules of suretyship law as attempted in §120 (5) and (6) is too narrow in its scope and the mere partial provision is worse than none at all. He concludes that either the incorrect sections re-

lating to the law of suretyship should be eliminated, or another should be added to the effect that an accommodating maker or acceptor will be discharged if the holder, with knowledge, releases or gives time to the accommodated party.

"Aside from the criticism that the statute itself does not compel the overruling of the existing suretyship law, the most cogent objection to the majority rule is that the rights of the surety do not depend upon the face of the paper but on outside equities and a recognition thereof would not actually obstruct negotiability nor impair circulation, since the rule only applies where the holder has knowledge of the principal and surety relation between the obligors and has acted in disregard of the equities arising from the contract of suretyship." (Mortgage Co. v. Chotiner (supra) at page 144).

The inadequacy of the majority view is thus apparent, but this unfortunate view is so firmly intrenched that only an amendment of the Uniform Negotiable Instruments Law could result in the necessary change in the rule. While New York is free to follow the minority, the uniformity which the Act was supposed to attain has become impossible under the decisions of the different states. The remedy thus is an amendment expressly permitting suretyship defenses.

In conclusion, it might be noted that while the majority view requires an unreasonably strict interpretation of §§119 and 120, the defense of extension of time is one of the more technical surety defenses and the accommodation party's right which is sought to be protected is more often imaginary than real. The court in the Chotiner case said that this fact made it less reluctant to follow the majority rule. It limited its findings strictly to thesituation at hand and did not claim to pass on the effect of the Negotiable Instruments Law on other suretyship defenses, although it admitted it could see little room for distinction between the varied suretyship defenses. But as in all other majority decisions, the fundamental reasoning and interpretation which prevents discharging the surety by virtue of an extension of time, will similarly operate to deny to him any of the other suretyship defenses not specifically mentioned in the Uniform Act. So the present decision is as unfortunate as any of the other majority holdings.

ARNOLD GOODWIN CHAPMAN, JR.

CRIMINAL LAW - FELONY MURDER

DUTY TO CHARGE INFERIOR DEGREES OF THE CRIME CHARGED

"Upon trial of the indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged or of an attempt to commit a lesser degree of the same crime." This section (610) of the New York Penal Law, is declaratory of the common law. At common law the jury might convict of a cognate offense, but of a less aggravated character, where the language of the indictment was broad enough to embrace such lesser offense. Code of Criminal Procedure §444 provides that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto. The purpose of this provision is to carry out the intent of §610 of the Penal Law. Upon the trial it is the duty of the judge to instruct the jury as to the degree of the crime charged.

The rule and its application caused no trouble. But its exceptions and limitations have continually been the subject of judicial controversy. This has particular application to felony murder indictments and trials. The rule may be deviated from, in homicide cases, only when intent to kill is not a necessary element of the offense charged in the indictment and established on the trial. This is the ruling of the Court of Appeals of New York in the case of People v. Schleiman,(197 N.Y.383) and it was reiterated in People v. Van Norman (231 N.Y.454).

In a recent decision of the Court of Appeals many grave questions concerning the application of the exception are raised. The majority of the Court in People v. Stevens and Waterbury (272 N.Y. 373) thought that under the indictment and facts of the case it was proper for the trial judge to refuse to instruct the jury as to the lesser degrees of homicide. Judge Lehman in a vigorous dissent maintained that such a charge was improper and prejudicial to the defendant's rights.

The evidence of the case established that the defendants made preparation to rob the National Bank of Lacona. They entered during the noon hour. Both defendants were armed with revolvers. At the time there were three persons in the bank - a clerk, a teller, and Charles Salisbury, chairman of the Board of Directors, who was seated at his desk in one corner. The defendants forced the teller and the clerk at the point of loaded guns to proceed to Salisbury's desk at this moment Salisbury arose. The defendants ordered him back. Being slightly deaf, he did not hear. When he failed to obey, both defendants shot at him. One shot entered his heart, the other his thigh.

After arrest the defendants made a full confession. This established prima facie that the defendants killed Mr. Salisbury during an attempted robbery. They were indicted under two counts - the first count in common law form, the other charging that they killed Salisbury while engaged in the commission of a felony. At the trial both defendants claimed that at the time of the shooting they had

abandoned the robbery. The defendant Waterbury introduced evidence to prove that he was insane. The defendant Stevens took the stand and put forth the defence that he acted under the coercion of Waterbury. The Court, at the request of the District Attorney, submitted the case to the jury on the felony murder count only and charged that it must find the defendants guilty of murder in the first degree, or acquit them.

Judge Finch, writing the majority opinion, states, "It is true that where there is evidence from which the jury could find the defendants guilty of a lesser crime, the jury must not be left with the alternative of convicting of murder in the first degree, or acquittal. On the other hand, in felony murder cases where the facts are susceptible of one interpretation only, the defendants are guilty of murder first, or they are not guilty at all, and the Court may properly refuse to charge a lesser degree of homicide. That each defendant shot the deceased is not denied, nor is it denied that they were engaged in the commission of a felony." This last statement contradicts his earlier assertion that "Both defenses (insanity and coercion) as well as abandonment were submitted to the jury and duly rejected by them and the evidence sustained the finding of the jury." The defendants did deny that they were engaged in the commission of a felony at the time of the fatal shooting. They offered evidence that they had abandoned the felony. The question of abandonment was submitted to the jury. The defense, it is admitted, was weak but it was a question of fact for the jury to pass upon. Such was the rule laid down by the court in McNevin v. People (61 Barb. 310), where the judge restricted the jury in event of conviction to murder first or manslaughter third. The Court said, "Unless there was no evidence at all of any other crime murder first or manslaughter third it was error to charge as the Judge did and to refuse to charge the different degrees of homicide. Any other course makes the Judge act also as the Jury in respect to those degrees which he excludes from their consideration because he determines as a matter of fact that the evidence will not support a certain verdict, which he never has the right to do if there is any evidence tending in any degree to make out that crime."

The majority opinion in the Stevens case (supra), followed the rule of the Schlieman case (supra) - that where the facts are susceptible of one interpretation only in felony murder cases, the defendants are guilty of murder first or not guilty at all. There the court held that the judge may refuse to charge lesser degrees only where evidence is directed toward the establishment of the kind of murder in which the intent to kill is immaterial. The decision was based on the fact that there was no evidence to sustain any other finding. The opinion warns this rule must be carefully applied. "The conditions are exceptional, however, which warrant a refusal to instruct the jury as to their power to convict of a lesser degree of the crime charged for which the defendant is upon trial and great care should be observed, as was done here, not to withhold such instruction unless the case is one like that before us, where there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal."

In People v. Martone (256 N.Y.395) this rule was followed. In this case there was no evidence tending to identify the defendant as

the actual killer. The evidence justified only one verdict. There was no possible view of the facts which would warrant any verdict except murder first degree or acquittal. A similar situation is presented in People v. Seiler, (246 N.Y.262). There the defendant and three others held up a speakeasy. Masterson, a customer, was shot by one of the defendant's partners. The judge charged the jury they must find him guilty of first degree, or acquit. There was no possible view of the facts under which he could be found guilty of a lesser degree. He did not fire the fatal shot. He was guilty of felony murder or not guilty at all. There was no other alternative.

It is apparent where there is no other evidence introduced, or where the defendant did not fire the fatal shot, that he must be convicted of felony murder, or acquitted. But in most cases there is another view of the facts possible, which makes it mandatory that the jury be instructed as to the lesser degrees of homicide. In People v. Moran (246 N.Y.100), the trial judge submitted the case solely on the theory of felony murder. The defendant was stopped by two police officers while riding around in a car. The defendant jumped out and shot both officers. The Court of Appeals reversed the conviction and stated in its opinion, "This Court has given warning more than once that conditions justifying submission of a 'felony' grade of murder to the exclusion of all others must be understood to be 'exceptional,' (citing People v. Schlieman, supra). Such a submission is proper only where there is no possible view of the facts which could justify any other view of the verdict. Apparently the warning needs to be repeated. Evidence uncertain in its implication must not be warped or strained to force a jury into a dilemma of choosing between death and freedom."

The jury in the Stevens case was forced into just such a dilemma. After four hours of deliberation they asked the court whether, if found guilty, a verdict of other than murder first degree could be entertained. The court replied, not under the charge here, nor under the indictment upon which these defendants are tried. Lehman, in his dissent, points out, "The administration of justice is not so tightly bound by legalistic formulas that the life or death of an accused man may be made dependent upon the manner in which a charge is formulated in the indictment. Certainly the probative value and effect of evidence presented to the jury cannot be changed by the form of indictment or the choice of the District Attorney to have the case submitted to the jury under one count of the indictment rather than another." There were other possible views of the facts. The defendants offered evidence of abandonment. The evidence was weak and not very persuasive, but it was sufficient to raise a question of fact for the jury to pass upon. Under the charge if the jury found that the defendants had abandoned, they would have to acquit. Yet how could the jury acquit these men? A man was shot down in cold blood. The defendants admitted they did it. No jury could turn them scot free. If the defendants had abandoned, there was evidencewhich would allow them to convict of murder first degree, killing with premeditation and deliberation, or murder second degree or some other degree of homicide.

The trial court admitted the possibility of the defence of abandonment when they submitted it to the jury. Yet the majority opinion of the Court of Appeals held "It is not denied that the defendants were engaged in the commission of a felony. The defendants according to their own story had not even retreated when they shot the deceased." (Stevens case, supra). In People v. Nichols, (230

N.Y.241) the defendant alleged abandonment. The court held even the most favorable aspect of the evidence would not permit the jury to say he affected such retirement from the criminal plan to which he was a party before the fatal shot was fired. At the time he claimed abandonment it had been carried to the point where murder was the immediate and natural if not the inevitable result. People v. Chapman (224 N.Y.463) contains a similar factual relation and decision. Both of these cases are distinguishable from the one in question. In each, when the defendant claimed abandonment, he left a partner still engaged in the felony and gave the partner no opportunity to take similar action. The felony had progressed too far; there could be no abandonment unless all had the same opportunity. In this case they abandoned the crime in concert. Each took the same action. One was not left behind in a position for which the other must assume equal responsibility. Their presence on the premises was important in indicating that they were still engaged in the commission of the original crime. "Such presence was important because it was a circumstance tending to show, in connection with other facts, that the homicide was actually committed in the course of or for the purpose of carrying out the original crime. Circumstances show that the crime or attempt has been terminated before the homicide was committed." (People v. Smith, 232 N.Y.239).

Abandonment from the evidence was a possibility. Stevens' defence of coercion presented an even stronger case. If as he claimed he was forced into the robbery through the fear that Waterbury would shoot him if he did not take part, he could not be guilty of felony murder. The constructive intent, carried over to the murder from the original felony, would be lacking. He would have no criminal intent as to the robbery so he could have no implied intent as to the murder committed in the commission of that crime. Yet when Stevens shot the deceased, he might have been acting from excitement or desire to escape, or some other motive than coercion. But under the charge, if the jury believed he entered the robbery plan from coercion, they would have to acquit him. Surely he might from the evidence be found guilty of murder second or manslaughter. The Court of Appeals in People v. Koeber (244 N.Y.147) reversed a conviction of felony murder because the trial judge refused to instruct the jury upon the degrees of homicide. The defendant there had raised the defense of intoxication. He had introduced some evidence tending to raise the question of whether he was incapable, because of drink, to form the specific intent which was an element of the underlying felony. The court said in that case, "The fact the accused did not have the intent to rob would not mean acquittal should follow. It is conceivable that he might be guilty of some other degree of homicide. He might be guilty of manslaughter or murder second degree." The court reversed the conviction but added "We may doubt whether the evidence of intoxication adduced by the defendant would carry sufficient weight with an intelligent jury to affect its verdict."

The dissent in the case at bar asked the pertinent question "Upon what ground can that case be distinguished from this? In both cases the defendant charged with homicide during the commission of a felony produced evidence which raised questions as to whether the accused was the guilty participant in the felony. If a person with a mind too befuddled with drink to form an intent to commit a robbery may still be guilty of some degree of homicide, then surely a defendant who is coerced into apparent participation may also be guilty of some degree of homicide." Thus as to both defenses it would be possible for the jury to find the defendants guilty of some degree

of homicide if they found the facts as the defendants claim. The evidence was not at all persuasive but "The jury alone has the power to find that fact and may refuse to find it." (People v. Seiler, supra). The jury are the sole and exclusive triers of the fact. The court cannot charge as a matter of law that the defendants were engaged in the commission of a felony. The warning that the court has so often given, that instructions be refused only in exceptional cases, was not heeded here. "It is possible to have a factual situation in case of felonious homicide where only one conclusion can be drawn as to whether or not the homicide took place during the commission of a felony. Instances where the trial judge may charge the point as a matter of law are exceptiona." (People v. Walsh, 262 N.Y.140).

The majority opinion in the case at bar holds by implication that at the trial of a murder committed in commission of a felony it is proper to refuse to instruct the jury as to the lesser degrees of homicide even though there is evidence of intent which is an element of the lesser degrees. The opinion states, "The only possible ground upon which it may be argued that this latter rule (i.e. where the facts are susceptible to one interpretation only, the defendants are guilty of murder first degree or they are not guilty at all) does not apply in the case at bar is that both defendants claim abandonment and Stevens claims coercion." Therefore, if the killing was done during the commission of a felony, the lesser degrees do not have to be submitted even though on the facts it would be possible to find actual intent and the other elements of the lesser degrees. Disregarding the defenses of abandonment and coercion it still would be possible for the jury to find from the evidence a premeditated and deliberate killing, or murder without premeditation and deliberation or a killing in the heat of passion. The dissent holds that it is never proper to refuse to instruct the jury as to the lesser degrees unless the facts are susceptible of one interpretation only. That is only where there is no evidence of actual intent on part of the defendants which would make them liable for a lesser degree of homicide This seems to have been the rule. Cases which would have held the refusal of instructions proper were cases in which it was not possible to find any actual intent on part of the defendants. In cases like the Seiler case (supra) and the Martone case (supra) where the killing was done by a partner or the Schleiman case (supra) where there was no evidence that the defendant was the actual killer, there could be no intent on part of the defendant so he could not be guilty of a lesser degree.

The rule laid down by the majority would make felony murder a separate and distinct type of homicide of which there would be no lesser degrees. This is the view held in a few states. "Where the statute makes homicide in furtherance of robbery murder in the first degree the Court need not submit to the jury the question of murder second degree since there are no degrees in murder committed in an attempted robbery." (State v. Mewhinney (Utah) 134 Pac.632). This view has been rejected by most states because it denies the jury the right to reject evidence and find guilty of a lesser degree of the crime made out by the evidence. The dissent in the case at bar states, "The mandatory death penalty upon conviction of murder in the first degree, has, I think, survived only because a jury has, under the statute, as at common law, power to find a lesser degree of guilt even in cases where no reasonable person could doubt that the defendant has committed acts which the statute defines as murder in the first degree." The majority's rule makes it proper to refuse to

instruct the jury as to the lesser degrees, even though there was evidence of intent and other elements of the lesser degree, if the defendant actually killed a person during the commission of a felony. This would leave the jury in their dilemma of choosing between death and freedom where the defendant killed in the commission of a felony.

The Quinn Law which was added to the Laws of New York March 17, 1937, provides that the jury may recommend life imprisonment for a person convicted of felony murder. This act no doubt was intended to apply chiefly to that class of cases where the facts were exceptional and the defendant was either guilty of murder first degree or innocent. Thus where the defendant was not the actual killer but a guilty participant in the underlying felony the jury may recommend life imprisonment. This was intended to soften the harshness of the law which provided that all must pay the death penalty. Undoubtedly the law would apply to a case like the Stevens case. This would give a solution to a practical problem and lead the jury from their dilemma. There still remains the fact that the defendants should have the right to have the jury and not the court pass upon the degree of their guilt and, upon trial, to have the court charge the degrees of the crime where the facts are susceptible to an interpretation which would include every element of such degrees.

JOSEPH DORMER STEPHEN

CONSTITUTIONAL LAW -

DELEGATION OF LEGISLATIVE POWERS TO THE EXECUTIVE

Much discussion has arisen, of late, concerning the powers and limitations of the Executive, Legislative, and Judicial branches of our system of government. This has been due, of course, to recently proposed legislation concerning the last of these three branches. On the one hand, we are warned that such would cause the destruction of our system, tried by experience, the subordination of the one to the will and purposes of the other and, in short, the creation of an embryonic dictatorial regime. Proponents assert that our system has become decrepit, progressive legislation retarded, and a new, more liberal spirit must be acquired. Lawyer and layman alike realize the importance of the issue and an individual opinion is inevitable. Far be it from us, however, to dissertate here on the relative merits of the arguments. Yet, the fact remains that the subject of our system of government, and into which branch it vests powers, has become today one of vital interest. Apropos to this has been a recent decision in the case of U.S.v. Curtiss-Wright Export Co. ___U.S.____, 81 L.Ed.166).

Congress, by a joint resolution of 1934 (48 Statutes at Large, Chapter 365) provided, "If the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in the Chaco may contribute to the re-establishment of peace between those countries, and after a consultation with other American republics, he makes a proclamation to that effect, it shall be unlawful, except under such limitations the President prescribes, to sell arms or munitions to those engaged." Pursuant to the law, the President proclaimed such sales as a violation of the joint resolution, and eighteen months thereafter revoked such proclamation.

This case arose when the appellees were indicted for a violation of the law by selling machine guns to Bolivia, a country engaged in the armed conflict. Appellees defended, and were successful in the lower court, on the ground that the joint resolution was unconstitutional as an unlawful delegation of the legislative powers of Congress to the Executive. The Supreme Court reversed the decision holding that delegation was not unconstitutional but valid, and appellees were convicted.

A review of the previous decisions of the Supreme Court, concerning the subject of the unlawful delegation of legislative powers, prior to a discussion of the present case may lead not only to a better understanding of the question here involved but towards a perspective of the subject as a whole.

The Constitution of the United States provides, "All legislative powers herein granted shall be vested in the Congress of the United States" (Art.1 §1). By this, it is manifest that the Congress is not permitted to abdicate, or transfer to others, the essential legislative function with which it is thus endowed. True, there is no express prohibition in the Constitution itself to this effect but such is not necessary in view of the position taken by the courts, without exception, in the matter. The attitude and policy

were well expressed by Justice Story when he wrote, "The true meaning is that the whole power of one of our three departments of government shall not be exercised by the same department that exercises the whole of the other." (Commentaries on the Constitution of the United States).

It seems obvious, however, that a "rule of reason" would not permit an over-strict construction of the doctrine, for such would create an anomely in government. The science of government is a practical one and a smooth co-ordination of parts requires a delegation of detail which makes for flexibility. It would be a virtual impossibility for Congress to meet, every time a situation arises requiring the enactment of legislation to become effect ve immediately. Circumstances require, at times, the instant application of legislation, and again, - a new situation arising, - revocation might be imperative. Thus delegation of detail and discretion as to existing facts is necessary for a lubrication, as it were, of the wheels of government and for the well-being of those governed.

This principle was early recognized and declared in Aurora v. United States (7 Cranch 382). The ship Aurora was condemned as carrying a cargo in violation of the Non-Intercourse Act of 1809 (2 Statutes at Large 528 -Chapter 24) which expired in 1910. Congress then provided that if France or England should revoke or violate their edicts to refrain from violating the neutral commerce of the United States, the President should reinstate the law by proclamation. Pursuant to this power the President issued the proclamation which was contended by the petitioner to be the exercise of an unlawful delegation by Congress of its legislative powers. The Court decided that the power of Congress was not delegated but there was merely prescribed by the statute the evidence which should be adduced upon which the law would go into effect.

The question was again reviewed in Marshall Field Co. v. Clark (143 U.S.506). Congress enacted in 1890 (26 Statutes at Large 576) "with a view toward securing a satisfactory reciprocal trade," that "when the President shall be satisfied that countries imposing tariffs are being reciprocally unfair and unreasonable, it shall be his duty to suspend the free introduction of those enumerated articles." The court drew an important distinction in holding that the legislative department cannot delegate its power to make a law, but it may make a law and delegate the power to determine some fact or state existing upon which the law makes or intends to make its own action depend. To deny this would be the stifling of a workable government. Here the suspension of the introduction of articles was mandatory, unfairness being apparent. The President, in such instance, does not make the law but is merely the agent of Congress to ascertain and declare the event upon which the express will was to take effect.

A line of similar decisions establish and reiterate this principle. Statutes have been declared valid which created forest reserves and provided for the ingress and egress of settlers complying with the rules and regulations established by the Secretary of Agriculture. (United States v. Grimaud, 220 U.S.506).

The Court ruled, in Red C. Oil Co. v. Board of Agriculture (222 U.S.506) that a statute authorizing the Secretary of the Treasury establish standards on imported teas, was valid. Congress, it was reasoned, fixed the primary standard and committed to the Secretary the mere executive duty of effecting the legislative policy.

Also, in Advent v. United States (266 U.S.127) an Act "authorized the Interstate Commerce Commission wherever there was a shortage of equipment or congestion in traffic, to suspend existing rules or create new regulations." (Transportation Act 1920 - 49 U.S.C.A.1). The delegation, the Court ruled, did not allow the Commission to act according to its opinion as to whether a given legislative purpose may contribute to a future result, but rather whether a situation then existed which warranted an enforcement of the law.

By the Laws of 1912 (22 U.S.C.A.236) it was provided "whenever the President shall find in the American countries a condition of domestic violence existing he may proclaim it unlawful to export arms and munitions of war to such country." In line with previous decisions, the court ruled, a policy was fixed, and only facts necessitating its proclamation were required to be found by the President. (United States v. Chavez, 228 U.S.525).

The doctrine was probably extended its fullest in Federal Radio Commission v. Nelson Brothers Co. (289 U.S.266). Congress delegated to the Federal Radio Commission in 1927 (44 Statutes at Large, Chap. 169) "The right to assign wave lengths and frequencies as public convenience requires." Indeed, the rule as established by Congress seems indeterminable. The phrase "as public convenience requires" seems to us, if anything, vague. Yet the Court decided that the statute declared a fixed policy to make allocations and assignments according to a stated criterion, namely, an equitable distribution of facilities.

The doctrine of non-delegation may seem to be emasculated, if not destroyed, by the preceding decisions. There is, however, a very important and limiting qualification to the rule established by the cases. Congress may enact the law leaving the determination of the existing facts necessary for its proclamation or enforcement to the Executive or other agent. If the power delegated is to take effect only when the Executive deems the act expedient, it is void. Congress must define the law, and set up the circumstances when it is to take effect, or its delegation is a nullity. To hold otherwise would not effect a lubrication of the "wheels of government" but rather the shifting of the "wheels" into reverse gear.

The case of Panama Refining Co. v. Ryan (293 U.S.388) establishes and well exemplifies the rule that "an unfettered delegation is an invalid delegation." The litigation arose as a result of the enactment of the National Industrial Recovery Act in 1933 (15 U.S.C.A. 709) by which the President is authorized to prohibit under penalty of fine or punishment or both, the transportation in interstate commerce of petroleum in excess of the amount permitted by state law. The President authorized the Secretary of the Interior to enforce the law, and the petitioner was indicted for its violation. The Court held that the statute was unconstitutional, as no chart was established which the President or his appointed subordinate must follow. From the decision, the rule is inescapable that Congress must lay down some intelligible principle to which the person or body authorized to act, is directed to conform. Here no standard had been established, nor was there set forth requirements for action, nor definition of conditions under which transportation would be permitted. Conformity to no norm being required, the statute was invalid.

A similar situation arose and was determined in the case of Schecter Poultry Cor. v. United States (295 U.S.495). The litigation, now famous because of its far-reaching consequences, arose under §9 of the same National Industrial Recovery Act. The President, by virtue of the Act, was authorized to enact "Codes of Fair Competition," the purpose being described, "to establish the rehabilitation of industry in order to expedite industrial recovery." In its opinion the Court discussed and held applicable its decision in the Panama Refining Company case, supra. The Court concluded that Congress was too general, too vague, too much inclined to bring about a millenium in one paragraph, to enable the Court to determine just what policy the President was to effectuate. As Professor Powell of Harvard Law School put it, "Congress had expressed a hope of heaven, but it had forgotten to specify anything that could be called a route." (Recovery And the New Deal).

With these cardinal principles in mind let us look at the case of United States v. Curtiss Wright Corporation (supra). The Act, let us recall, authorizing the President to make the proclamation, gave him the power to firbid the sale, in the United States, of arms and munitions of war, if he should determine that such would contribute to the re-establishment of peace. At first blush, we may be prone to say that such was an unlawful delegation within all the authorities. It might well be argued that the issuance of the proclamation is wholly discretionary with the Executive. It is discretionary - not as to a present existing state of affairs - but rather the issuance is allowable whenever the President believes it will create in the future some panacea for the warring nations.

The facts, to our mind, are clearly distinguishable from the case of United States v. Chaves,(supra). In the latter case, the President could forbid the exportation if he should find a condition of domestic violence existing. As we have pointed out, judgment as to a present situation was all that was required. The application was as methodical as a determination of the sum of two numbers. The present case, however, was more than the exercise of a stereotyped agency. The President was to judge the effect of the legislation in future, rather than the situation in praesenti. No norm was stated, no plan established, no chart defined, upon which the President must proceed. To our mind, the statute authorized, rather than prescribed.

It may be with no little doubt, therefore, that we view a holding that the delegation in the present case was valid. It appears, however, upon a reading of the decision of the Supreme Court, that they refused to discuss the validity of the joint resolution as it related exclusively to internal affairs. Assuming (but not deciding) that the resolution would be a nullity had it related merely to the internal workings of our Government, the Court ruled that such a decision would not follow inthe case here in question. A vital distinction was said to exist between the President's internal powers and those germane to external matters.

To comprehend the decision fully, a view must be had - again at the expense of brevity - to the theory of our Government that the differences between these two functions are fundamental. In our Constitutional plan certain of the powers of the states were granted to the Federal Government. These were jealously relinquished with a view that such a vesting was necessary for the well-being and smooth co-ordination of the Nation. Thus, in so delegating, they intended

that these powers were to be exercised solely by the body in which they placed them. It seems apparent that if the states intended that the legislative powers were to be exercised by some other branch or agency they would have so transferred. In view of this fact the rule has arisen that Congress, and it alone, can perform only in conformity with those powers specially enumerated and such implied powers as are necessary to carry into effect those enumerated. The doctrine is subject to one important limitation - namely, it relates only to internal affairs.

It is logically irrefutable that one may grant only that which he possesses. If the states never, as of themselves, possessed international rights and duties, such could not be carved from the mass of the states' powers transferred to the Federal Government. It was never within the domain of the states to make war or peace, alliances or treaties. As was stated by Rufus King, "Considered as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They had not organs of defense nor offense, for they could not raise troops nor equip vessels of war." (5 Elliot Debates 212). The powers to regulate foreign affairs was in the central Government's being successively vested in the Continental Congress and asserted forcefully to be a right, by the Declaration of Independence.

It resultes, therefore, that the rights in the external realm were transmitted to the United States from source other than the States. These powers rather were the result of sovereignty. They were entities existing as concomitants of Nationality. By the Constitution the States relinquished nothing, and Congress, in this respect took on no new-fledged powers. The Constitution, of its own force, and the laws passed in pursuance thereof, have no effect in foreign territory unless in respect to our own citizens. (American Banana Co. v. United Fruit Co.,213 U.S.347). The operations of the nation in such territory must be governed by treaties, international understandings, and the principles of international law. If the United States does not possess these rights, then it is not completely a sovereign, and such rights cannot depend upon affirmative grants.

Though this power is inherently in Congress, circumstances have necessitated - and the courts have recognized - that the President must be the prime mover in affairs of an international aspect. The President alone is our spokesman in the difficult, comprehensive, and delicate problems in the extensive realm of external government. "The President," as Chief Justice Marshall said, "is the sole organ of the nation in its external relations and its sole representative with foreign nations." (Annals, 6th Congress Col.613). He makes the treaties, inasmuch as he and his appointed agents negotiate with the foreign nations. Congress exercises no active force in such conferences. True, Congress must ratify, and therefore exercises a potent control, but this is a prohibitive and passive function rather than one of initiation. From the creation of government it has been realized that the only practical way to deal with external matters is to have some agency other than Congress regulate them. The logical person, it was decided, was the President. He has a more intimate knowledge of the foreign situation, inasmuch as the ambassadors and consuls are his appointees and report directly to him. He is, as it were, the confidant of the Secretary of State. He must and does have sources of information which are of their very nature secretive and the disclosure of which to a Congress

would at times bring disastrous results. Such freedom is not allowed the President with respect to domestic affairs. This is evidenced by the right of Congress to direct the revelation of information concerning these problems and upon such mandate the President is duty bound to disclose such information whether or not he believes it is compatible with public interest.

Justice Sutherland, in the majority opinion of the Court, drew attention to a further fact upon which they could well base their opinion. Practically every volume of the United States Statutes contains one or more act or joint resolution which delegated Congressional power just as in the present case. Many of these, he reasoned, provided a standard less determinable than was here established. Yet none has been declared invalid. Such a multitude of statutes, even if supported less in principle than the instant case, should not amount to mere sound, signifying nothing. It is well established that while the court will not hesitate to declare unconstitutional an act which it finds to be such, yet the impressive array of the legislation of nearly a century and a half must be given due weight. As was stated in the case of Marshall Field Co. v. Clark (supra), "the practical construction of the Constitution as given by many acts of Congress, should not be overruled unless upon a conviction that such legislationwas clearly incompatible with the supreme law of the land."

The foregoing discussion may be so fundamental as to amount to mere superfluity. Yet, from it we may discern that both in principle and in practice the Act authorizing the President to make the proclamation was valid. To our mind, the decision of the Court is logically irrefutable. As the Government of the United States has the character of nationality, it has the powers of nationality, especially those which concern its relations and intercourse with other countries. Thus this power is inherent in Congress and they may freely delegate it without charting a course which their agent must follow. When the President is so designated, such discretion may be given to him as is deemed advisable. This, like all other governmental power, is limited only by the applicable provisions of the Constitution.

In summation, the rule appears, at present, to be more simple in its statement than in its application. In its fundamental aspect it may be formulated into those powers which are internal and external. Congress may delegate the former so long as it is careful to state a norm from which the Court can determine the policy. If an attempt is made to substitute executive determination for legislative judgment on the subject, the statute is invalid. It is in this latter phase that the difficulty arises. Whether a given state of facts present an indeterminable maze or a lucid chart, is the question the Court must decide. As to external affairs, Congress has the right to make an unfettered delegation, as such is not dependent - as are internal powers - upon express grants from the States. The rules have been established by the Court. They now need to be applied to the situations as they arise.

HARRY STEPHEN CHRISTENSON, JR.

QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest. All legal topics are included, and present a fair method by which you can test your own, or anyone else's legal knowledge. Compare your answers with those given on Page 103 of this issue.

1. X State imposes a tax on employers, the receipts to be paid out in the form of benefits to unemployed workers throughout the State, independently of the existence of any unemployment in the business of the contributor, or of any benefit to his employees. May an employer within the terms of the Act refuse to pay the tax?

2. X Company is incorporated in the State of New York. Its capital stock is owned by the Federal Government. It carries Government employees and freight at reduced rates. Can New York tax the income of one of its employees?

3. Has the State the power to prohibit importation of intoxicants
   (a) Before the adoption of the 18th Amendment - (1) Without the consent of Congress? (2) With its consent?
   (b) Under the 18th Amendment?
   (c) Under the 21st Amendment?

4. Congress authorizes the President to forbid the sale of munitions to the American countries if he finds a condition of violence existing in those countries. (a) Is such delegation of Congressional power unconstitutional? (b) If authorized to forbid such sales if he believed it would establish peace between the countries, would the delegation be valid?

5. A, B, and C break into a warehouse with intent to steal silk. A watchman discovers them. A and B shoot him at the same time. Either shot alone would have been fatal. At the trial under a felony murder indictment, A offers evidence that he was intoxicated; B offers evidence that he was coerced into the burglary by C. Has A the right to have the Judge instruct the jury on the lesser degrees of homicide? Has B?

6. In an action against a client for the reasonable value of services performed under a contract of retainer, the attorney having been discharged without cause, does the amount stipulated in the contract as the contract price, limit the attorney's recovery?

7. Is a tax on the transfer of a share of stock, imposed without regard to its value, a constitutional exercise of the taxing power of the State?

8. A executes a note, secured by a mortgage on real property which he thereafter transfers to B, subject to the mortgage. C who holds the note agrees with B to extend the time of payment, without the consent of A. Is A discharged (a) Under the Negotiable Instruments Law? (b) If the case arose prior to the adoption thereof?

THE STOCK TRANSFER ACT OF 1933 - AN EXCISE TAX

In 1903 the Supreme Court of the United States first upheld the validity of a tax which had as its basis a transfer or sale of stock certificates (Thomas v. United States, 192 U.S.363). The tax there involved was a stamp tax on a memorandum or contract of sale of a certificate of stock and was held to be an excise tax which Congress had the right to levy under Article I §8 of the United States Constitution. The tax was part of the War Revenue Act of June 13, 1898 and a similar measure at the time of the World War, the War Revenue Act of October 3, 1917, was not challenged as to its constitutionality in the only case involving that tax which reached the highest court (Provost v. United States, 269 U.S.443).

In Vaughan v. State, (272 N.Y.102), the Court of Appeals has clarified its position with regard to such taxes when levied by the New York State Legislature. The constitutionality of an amendment (Chapter 643 of the Laws of 1933 §§2, 3) to §§270, 270-a of the Tax Law was challenged in this case. Sections 270 and 270-a of the Tax Law were re-cast by the Act of 1933 into a form which is as follows: "There is hereby imposed and shall immediately accrue and be collected a tax, as herein provided, on all sales....and all deliveries or transfers of shares or certificates of stock....of one and one-half cents for each and every share, except in cases where the shares or certificates are sold for twenty dollars or more per share, in which cases the tax shall be at the rate of two cents for each and every share." (Laws of 1933, ch.643 §§2, 3). The basis for the tax, it is seen, is not primarily on the value of the shares, but on the number of shares transferred. Shares sold for any amount up to $19.99 are taxed at one and one-half cents; those sold for any amount of that are subject to the two-cent tax.

In 1905 the Legislature first passed a stock transfer tax of this general type. By the Laws of 1905, Chapter 241, there was imposed "on all sales or agreements to sell, etc.," a tax of two cents "on each hundred dollars of face value or fraction thereof." This tax was attacked in People ex rel Hatch v. Reardon (184 N.Y.431) on the grounds, among others, (1) that it made an improper classification and (2) that it was imposed on a wrong basis.

Under the first point it was argued that the classification made by selecting one kind of property (stock) was arbitrary and that such discrimination deprived certain persons of their property without due process of law and withheld the equal protection of the laws. This was answered, "Arbitrary selection and discrimination characterize the history of legislation, both state and national, with reference to taxation, yet, when all persons and property in the same class are treated alike, it has uniformly been sustained both by the State and Federal Courts." (Judge Vann, Hatch case, supra). And the Supreme Court of the United States has often pointed out the weakness in the argument that a tax on one calling must be extended to all in order to avoid discrimination. The equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the laws shall operate equally and uniformly upon all persons in similar circumstances." (Kentucky R.R.Cases, 115 U.S.321; also see Connolly v. Union Sewer Pipe Co., 184 U.S.540; Armour Packing Co. v. Lacy, 200 U.S.226; People ex rel Griffin v. Mayor, 4 N.Y.419).

The distinction was made - and this was to be even more important in reviewing later amendments - that the tax was not on the property itself, but on the transfer of that property and therefore it fell equally upon all sales within the class. Further that "The classification violates neither Constitution." (Hatch case, supra).

Under the second point, that it was imposed on a wrong basis, - in comparing this tax favorably with the often used tax on checks, which also called for a tax without regard to value, it was said "Convenience in doing business, the slight cost of collection and the necessity of preventing evasion are important considerations in laying an excise tax and the rule of counting rather than valuing is almost universally adopted, so that the citizen may know at once the amount of the tax and pay it by affixing the stamps required, which are the permanent evidences of the sum paid." (id.)

Very soon thereafter the Court of Appeals was confronted with another case which made necessary a qualification of some of the general statements made in the Hatch case. In 1906 the Legislature passed an amendment to the taxing provision of 1905 which imposed a tax "on each share of one hundred dollars of face value thereof," instead of "on each hundred dollars of face value or fraction thereof," (Chap.414 Laws of 1906 §315) and this amendment was at issue in People ex rel Farrington v. Mensching (187 N.Y.8).

The act of 1905 measured the tax by one hundred dollars of face value, ascertained by counting the shares, if issued for exactly that amount; by dividing each share into multiples of one hundred if issued for more, and by adding the face values and dividing the result into multiples of that sum if issued for less. The 1906 tax, however, was measured by the number of shares, regardless of face value or actual value.

Judge Vann, even though he had said in the Hatch case, "the rule of counting rather than valuing" is often used in laying an excise tax, when confronted by a tax which was based purely on "count" rather than any value of the shares of stock, he chose to say in the Mensching case, "The act now before us does not classify by arranging according to quality, but by arranging according to accident....While the Legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim, or caprice." The court seemed to feel that, though face value might not bear any direct relation to actual value the act of 1905 at least set up a standard by which some classification could be made, whereas the act of 1906 relied solely on the number of shares transferred to determine the tax and such a basis was held to be an arbitrary "discrimination in favor of one as against another of the same class," and as a violation of primary rights. (People ex rel Farrington v. Mensching, supra).

As a result of these two decisions it apparently was necessary to have some basis, reasonable or unreasonable, other than merely a "count" of the number of shares transferred, to levy a stock transfer in New York State. But in the appeal to the United States Supreme Court of the Hatch case (204 U. S. 152) Justice Holmes, in an opinion delivered after the Mensching case had been decided by the Court of Appeals, said, in considering the 1905 tax: "The inequality of the tax, so far as actual values are concerned, is manifest..... There must be a fixed and indisputable mode of ascertaining a stamp

tax.... When the taxes on two sales are equal the same number of shares is sold in each case; that is to say, the same privilege is used to the same extent. "This obiter was to be used later in helping the present Court of Appeals to arrive at its determination in Vaughan v. State (supra), Justice Holmes also pointed out the application of measuring excise taxes by count rather than value on checks, poll taxes, etc. (Bell's Gap R.Co. v. Pennsylvania, 134 U.S. 232; Merchants & M.Nat'l Bank v. Pennsylvania, 167 U.S.461).

Between the time of these decisions and the Vaughan case there were only two changes in the law which affected these tax principles. In 1912 the Legislature authorized the issuance of shares of stock without nominal or par value (Laws of 1912 Chap.351), and in 1913 this type of stock was declared to be subject to the regular two-cent tax on each share transferred (Laws of 1913 Chap.779 §1). Since such stock had no designated face value it was natural that the tax should be measured by the number of shares.

In 1932, a new §270-a was added to the tax law, which imposed an additional emergency tax equal to that previously payable. Since under the then existing law a four-cent tax would be payable on the transfer of each share of no-par value stock, regardless of actual value, and the same tax would be payable only on each one hundred dollars of face value on stock which did have a par, many corporations changed from no-par stock and par stock of high par value to par value of stock of low face value. As the Governor pointed out in a message to the Legislature on March 24, 1933, "In the case of a change from a no-par stock to a par value stock of one dollar per share....the State revenue is reduced to just one-hundredth. Multiplication of such cases seriously endangers the tax revenue at a time when the State needs every cent."

In response to this message the Legislature passed the 1933 act which was challenged in Vaughan v. State (supra) and the issue was squarely presented to the Court of Appeals in that case, viz: Was a tax on the transfer of stocks which had as its basis, the number of shares transferred, a constitutional exercise of the taxing power?

The Court refused to consider the rule laid down in People ex rel Farrington v. Mensching (supra) as controlling. In referring to the act of 1912 sanctioning the issuance of no-par stock Judge Loughran said, "The Legislature thereby adopted the view that face value as a symbol of the real worth of shares in a corporation was a conception that had been rebutted by experience. "The importance of the message by the Governor and the realization that the act was passed in response to this message and was necessary to put an end to the evasion of the old taxes was emphasized. "In the face of these circumstances this court must accept the judgment of the Legislature in rejecting the device of taxing transfers of par stock on the basis of par value and in determining to treat par and no-par shares alike for the purposes of this tax." (Vaughan v. State, supra).

Further illustrations of the United States Supreme Court's belief that such taxes were well within the taxing powers of both the State and Federal Constitutions were found to be present in the upholding of other privilege taxes levied on no-par value shares at a flat rate per share or on the basis of assigned value. (People of State of New York v. Latrobe, 279 U.S.421; International Shoe Co. v. Shartel, 279 U.S.429). In the International Shoe Co. case a State statute (§9836 Missouri Revised Statures as amended by §12 of the

Stock Corp. Act of 1921) providing for the computation of an annual franchise tax upon corporations having non-par stock by assigning such stock a specific value irrespective of its actual worth, and applying it to the rate applicable to par value stock, was held not to deny the equal protection of the laws. This would seem to indicate a liberality in viewing such taxes that goes well beyond the necessities of the Vaughan case.

The decisions in the Hatch case and the Mensching case left the law on this point unsettled in New York State. This was especially true when the obiter of Justice Holmes in the appeal of the Hatch case to the Supreme Court was considered. Adding to this, the act of 1912 which abolished the necessity of issuing stock at a nominal or par value, it is apparent that the Court of Appeals was not bound by either of the two previous cases. In determining that the tax is valid as now set forth, it is apparent that the Court has been able to approve the intent as expressed by the Executive and the Legislature, and at the same time follow the conclusions set forth in Justice Holmes' opinion (People ex rel Hatch v. Reardon, 204 U.S.152).

The division, fixing a higher tax rate for those stocks sold at twenty dollars or more per share than for those under that price level, was considered a reasonable adjustment of the rate to the value of the privilege and to ability to pay. (Magoun v. Illinois Trust and Savings Bank, 170 U.S.283; Clark v. Titusville, 184 U.S. 239). The Court, having held the act valid even though its basis was not value,but merely the number of shares transferred, or 'count,' naturally approved the subordinate plan to set a reasonable level at which the amount of the tax would increase.

FRANK SEYMOUR HIGGINS

ATTORNEY AND CLIENT - QUANTUM MERUIT

RECOVERY LIMITED BY THE CONTRACT PRICE

In the recent case of Matter of Montgomery (272 N.Y.323) an attorney, one Everett K. Van Allen, entered into a contract with Margaret Montgomery, as executrix of the will of James H. Montgomery, deceased, to perform certain services in the settlement of the estate, for the sum of $5,000. The value of the estate was in excess of six hundred thousand dollars. It was made up of real estate holdings, first and second mortgages, leases, etc. Concededly it was a situation involving very much work on the part of an attorney. The executrix was not the easiest kind of client. She refused properly to co-operate with the attorney in the liquidation of the estate. When the claimant had performed about five-sixths of the services contracted to be performed, the executrix discharged him without adequate cause. Thereupon the claimant brought this action to recover for his services. His contention was that the amount of his recovery should not be limited by the amount stipulated in the contract, on the ground that the retainer having been wholly abrogated, (Matter of Tillman, 259 N.Y.133), he is relegated solely to a recovery on quantum meruit, and the contract price does not limit the amount of recovery. The executrix contends, however, that the claimant can recover no more than the amount stipulated in the contract for the reason that an attorney cannot recover damages for the cancellation of a contract of retainer (Martin v. Camp, 219 N.Y.170), since it is an implied condition of every contract of retainer that a client may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney. (Matter of Dunn, 205 N.Y.398, 402).

The question therefore directly presented to the court is, whether an attorney discharged without adequate cause is bound by the amount stipulated in his contract as the amount recoverable for his services.

The court below, in 156 Misc.583, found that the reasonable value of the claimant's services rendered was $13,000.

It would seem just that an attorney, having specifically agreed to do a certain job for a stipulated sum, should not be allowed to recover more than the sum stipulated, even though discharged before the completion of the contract, but should be relegated to quantum meruit, the reasonable value of his services, up to and including the amount stipulated, and no more. There are sound reasons for this statement. The attorney has agreed to do the whole job for a certain sum. It was never the intention of the parties that he should recover more than that sum. The attorney should not be allowed to recover a profit - something which he absolutely never expected - for the exercise of a right which the client has impliedly reserved in himself. It would seem to be a fair rule that, because of the peculiar nature of the attorney and client contract, the client should not be liable for more than the amount stipulated as the attorney's compensation if the discharge is without cause. It cannot be held to be a wrongful discharge since the client has the implied right to discharge the attorney at will with or without cause. Therefore, as a necessary corollary, a client cannot be held liable in damages for doing that

which under the contract he has a right to do." (Martin v. Camp, 219 N.Y.170, 175). In such a case the attorney may recover the reasonable value of the services which he has rendered. (Martin v. Camp, supra). The question is still presented, however, whether the amount recoverable in quantum meruit should be limited by the amount stipulated in the contract? It seems in all justice that it should.

The Court of Appeals, however, does not agree. The Court cites with approval, in Matter of Montgomery (supra), the cases of Matter Tillman (259 N.Y.133) and the Matter of Krooks (257 N.Y.320).

The case of Matter of Tillman (supra) was one wherein James A. Tillman retained one Komar as his attorney to prosecute claims against several foreign insurance corporations. The attorney's compensation was to be three per cent of the proceeds but in the event that the litigation should result in no proceeds, the attorney was to receive nothing. After the client's right to recover had been established and the litigation was terminated except for computation by a referee of the amounts due, another attorney was substituted for Komar. The court held as to Komar's right to recover: "The client is entitled to cancel his contract of retainer but such an agreement cannot be partially abrogated. Either it wholly stands or totally falls. After cancellation, its terms no longer serve to establish the sole standard for the attorney's compensation. Together with other elements they may, however, be taken into consideration as a guide for ascertaining quantum meruit..... On the termination of the contract of retainer a cause of action for the reasonable value of his services immediately accrued to the attorney. (Adams v. Fort Plain Bank, 36 N.Y.255, 260)." (Matter Tillman, supra).

Matter of Krooks, (257 N.Y.329) was a case in which one Krooks owned real estate assessed at $25,000, title to which the City of New York acquired by condemnation. By written contract, Krooks retained one Conrad as her attorney to take such proceedings as might be necessary in connection with the collection of any award or the payment of any compensation resulting from the condemnation, and by that contract she agreed to pay him all moneys in excess of $38,000 which "may be paid to me or my assigns as a result of said proceedings." Conrad faithfully performed services as her attorney and acted with such energy and skill that the Justice at Special Term before whom the condemnation proceeding was conducted, stated in a memorandum that the sum of $36,500 was awarded by him for the Krooks property. Two days after the publication of that memorandum Mrs. Krooks cancelled her retainer and the following day instituted this proceeding to set aside the written agreement and to determine the attorney's lien. The client held that "the client's right to control her retainer does not permit her to cheat her attorney. (Matter of Levy, 249 N.Y.168, 170). If the attorney shall be paid the reasonable value of his services no cheating will occur.....Quantum Meruit is the rule to apply. (Matter of City of New York, 219 N.Y.192)." (Matter Krooks, supra).

It will be noted that both the cases of Matter of Tillman and Matter of Krooks (supra) were cases in which the attorney's fee, and the amount thereof was contingent upon success in his endeavors. In such cases quantum meruit is the one rule which would be fair to both parties - the attorney and the client. As the court in the Matter of Tillman properly stated: "The value of one attorney's services is not measured by the result attained by another. This

one did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar."

It does not seem that this reasoning should be applicable to the facts in the case of Matter of Montgomery (supra). As Judge Lehman there stated in his strong dissenting opinion: "Nothing there said, and certainly nothing there decided is, I think, applicable to a case such as this. Here termination of the contract leaves intact the measure fixed by the parties for the compensation to be paid to the attorney, and neither reason nor authority in such case justifies a larger award of compensation to the attorney for a part of the stipulated services than he would have earned if the contract had not been terminated." (Cf. Proger v. New Jersey Fidelity & P.G.Ins.Co., 245 N.Y.1).

In support of this rule that an attorney should be allowed to recover quantum meruit, but in such case, no more than the stipulated contract amount, is the case of Sargent v. McLeod, (209 N.Y. 360, 364). This was a case wherein the attorney agreed to commence an action upon a contingent basis for his client,-the difference,- in this action. Before the action was tried, the attorney died. His representatives brought this action for the determination and foreclosure of an alleged lien had under §475 of Judiciary Law (Laws 1909, Chap.35; Consolidated Laws, Chap.30) by the intestate, Frank C. Sargent an attorney, upon the cause of action in favor of his client. The court held: "The extent of the recovery permitted his representative as the full reasonable value of the services rendered under the contract, not exceeding, however, the sum or the rate fixed by it."

The case of Wolfe v. Howes (20 N.Y.197, 203) is in point. Plaintiff's testator entered into a contract with the defendant for the rendition by testator to defendant of personal services, for a certain length of time and for a stipulated price. After having performed for sometime the plaintiff's testator became ill and was unable to continue and finally died. Plaintiff brought this action to recover for the services rendered by their testator. The court held: "The compensation was to be at the rate of $40 per month; $10 (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time This, however, having been rendered impossible, the plaintiff was to recover, if anything, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract."

This situation in Matter of Montgomery is novel in the State of New York. This attorney would be held down to the contract or less in the several jufisdictions that have passed on such matters. (L.R.A.1917F, pp.402,413). Some would hold under the ordinary rules of damages that $5,000 would be the value of his contract; others that the reasonable value of his services up to the discharge was to be limited by the contract price; because a recovery for interrupted performance of such service although based on reasonable value, could not in any event exceed the contract price. (Hunt v. Test, 8 Ala. 713; Smith v. Thompson, (Texas Cir.App.) 233 S.W.876; Brodie v. Watkins, 33 Ark.545; Bell County Bd. of Ed. v. Lee, 239 Ky. 317, 39 S.W. (2d) 492; American Surety Co. v. Fruin-Bambrick Co., 182 Mo. App. 667, 166 S.W.333; Henry v. Vance,111 Ky.72, 63 S.W.273).

No case prior to Matter of Montgomery has been found where the reasonable value of part has been allowed to exceed the agreed value of the whole. The cases gathered in Matter of Montgomery (156 Misc. 583) indicate that it necessarily is less in every instance. (Cf. at p.416).

However, when the case reached the Court of Appeals, it was held, citing with approval Matter of Tillman (supra) and Matter of Krooks (supra), that the discharge of the attorney cancelled and annulled the contract and that the contract having been cancelled, it could not limit the amount of the recovery, although it might be considered in fixing the amount of the reasonable value of the services rendered, the theory being that the cancellation could not be a halfway cancellation.

"It wholly stands or totally fails." (Matter of Tillman, 259 N.Y.133; Matter of Krooks, 257 N.Y.329).

"Under that theory, the contract price does not constitute a limitation on the amount of an attorney's recovery, although its effect may be to enhance the amount the client may be compelled to pay and in a certain sense penalizes the client for exercising a privilege given by law to discharge an attorney at will, regardless of cause."

"We are committed to the quantum meruit rule without limitation to the contract price in cases where the client voluntarily discharges the attorney." (Matter Montgomery, supra).

The court distinguishes the case at bar from Sargent v. Mc Leod (supra) in that in the latter case the termination of the contract is brought about by an involuntary act - e.g., death or disability - while in the instant case, the termination of the contract comes about by a voluntary act. In the former case the recovery for services rendered is limited to the contract price, while in the latter the rule is quantum meruit without limitation to the contract price.

Therefore, it would appear that the Court of Appeals has drawn a distinction between cases where the contract has been terminated by a wilful act and one in which the contract has been terminated by an involuntary act. Whether such a distinction should be drawn under the facts of the Matter of Montgomery, raises a serious question. The Court of Appeals itself had trouble in coming to its determination. To strengthen its decision the Court cited the Matter of Snyder (190 N.Y.66) as authority for holding that the attorney is not limited by the contract price. In the Matter of Snyder, the appellants, who were practising attorneys, made an agreement with the respondent for the prosecution by them in his behalf, of litigation against various parties under a plan of contingent compensation.

Various actions and proceedings were instituted under this retainer and services of much value were rendered to the client.

After a time Snyder entered into negotiations with the parties whom he was prosecuting for a settlement of the litigation and not only without the consent of the attorneys, but in spite of their protest, made an agreement for such settlement for the sum of $7,500. It appeared that the acts of Snyder constituted a repudiation of the contract. The court held: "The result of this is to permit the

attorneys to recover for the services which they have actually rendered according to their real value and independent of the original provision in the contract upon this subject."

It will be seen that there is a serious question whether or not this decision should be controlling upon the Matter of Montgomery case. They Snyder case was one in which the fee was upon a contingent basis. The client himself settled the matter. Therefore, in all fairness the attorney should not be bound by the terms of the contract since his fee depended upon the results of his own efforts and not upon those of his client. Quantum meruit should be the rule in such a case.

Where, however, the contract of retainer fixes the fee at a stipulated amount, win or lose, there is absolutely no reason for basing an attorney's recovery on the principle of quantum meruit. Quantum Meruit, in such case, will very often lead to very unfair results. The rule as laid down by the court in Matter of Montgomery would appear to be an extension of the rule of recoveries on quantum meruit.

The Court of Appeals, in Clark v. Mayor (4 N.Y.338), held that a person was not limited to the amount stipulated in the contract. In that case the plaintiff entered into a contract with the defendant to perform certain services at a stipulated price. The plaintiff performed a large part of the services and the defendant wrongfully discharged plaintiff. Plaintiff sought to recover under quantum meruit. The court held: "Plaintiff may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth." "When the party elects to consider the contract rescinded, and goes upon the quantum meruit, the actual value is the rule of damages."

The case of Clark v. Mayor (supra) can be distinguished from the case of Matter of Montgomery. It will be noted that in the former the discharge was wrongful while in the latter the person discharging was merely exercising a right which he has impliedly reserved in himself. This case was the ordinary one of breach of contract for labor and services to be performed. It did not involve the peculiar attributes of the contract of an attorney and client.

In the case where the discharge was wrongful there might be found some reason in justice where the party committing the wrong should be penalized. At least one's sense of justice is not shocked as it is where a party is penalized for exercising a right given to him under a contract. Should a party be penalized for exercising a right which he has reserved in himself with the consent of the other party? The Court of Appeals seems to think so. (Matter of Montgomery). Reason and justice dictate otherwise.

Nevertheless, the rule in New York is that where a party to a contract is discharged whether the discharge is wrongful, or is without cause, even though not wrongful, the party so discharges is relegated to quantum meruit and is not bound by the price stipulated in the contract, but may recover the value of his services rendered even though such value is in excess of the price stipulated.

THOMAS DENNIS NOLAN.

N O T E S

SPLITTING CAUSES OF ACTION.- The case of Union Trust Co. of Rochester v. Kaplan, (249 A.D.280) allows an extension of the rule against splitting causes of action. In this case the plaintiff held a bond and mortgage payable in one year, with interest semi-annually. Principal has not been paid, nor have certain installments of interest. There are also certain taxes due and unpaid. The plaintiff seeks a declaratory judgment to determine its right to recover for the interest and taxes without prejudice to its right to later foreclose the mortgage, which was long overdue.

The court approves of plaintiff's action on the ground that the interest forms an integral part of the contract. It is contemplated by the parties that the principal sum shall run for a long period, provided interest and taxes are paid when due. The court takes judicial notice that such, in general, is the nature of mortgages and that the contract here was divisible, - an agreement to do several things at different times. The court strengthens its position by arguing that the Legislature recognized this element of divisibility when it enacted the Mortgage Moratorium Act and that the courts should thus give effect to the spirit of this legislation.

The right to bring an action for interest and taxes without prejudice to a subsequent foreclosure action is not entirely without precedent. In Johnson v. Meyer (242 A.D.798, af'd without opinion 268 N.Y.701) the court granted plaintiff's motion for a judgment on the pleadings in an action to recover interest due on a bond secured by a mortgage and taxes paid by the mortgagee at the mortgagor's request. The memorandum opinion of the Appellate Division merely states that §§1077-a, 1077-b, and 1083-b of the Civil Practice Act do not prevent the bringing of such an action.

This case, thus, does not discuss the question decided in the Union Trust Case (supra) since here the effect of this section as a bar to a subsequent foreclosure action is not decided or considered.

Further authority for the decision in the Union Trust Case is found in the decision of Matter of Crane v. Craig (230 N.Y.452. This was an action to recover additional interest after the acceptance of an award and interest granted as damages for change in street grade. The court here advances the theory that where the interest forms an integral part of the debt and is not allowed merely as damages, then the mere acceptance of part of principal or interest does not bar a subsequent claim for the whole.

It is apparent, however, that the decision in the Crane case (supra) is not decisive of the issues presented in the Union Trust case (supra). In the former the issue is raised as to whether the acceptance of a part of a debt bars a claim for the remainder. The latter case involves the question as to whether two actions may be brought for the same debt or parts of the same debt.

The decision in the Union Trust case seems to be but an application of an old law to a new situation. It has long been held

that an award by the sovereign and the interest due thereon did not constitute a single cause of action, but were two distinct debts. (Murphy v. Prendergast, 99 Misc.326). This principle is applied now to the interest and principal of a bond and mortgage.

D. J. N.

* * * *

REVOCABLE TRUSTS - THE STATUTE OF WILLS.- It has, of course, long been a fundamental legal principle that testamentary bequests of all sorts, including testamentary trusts, must comply with the Statute of Wills. In some instances, deliberate attempts have been made to evade the statute. In other cases, through ignorance, mistake, or oversight, bequests and trusts that were otherwise valid have been thwarted because they ran afoul of the strict requirements of the statute of wills. In the recent case of Pinckney v. City Bank Farmers Trust Company (249 A.D.375), the Third Department of the Appellate Division has upheld the validity of a trust provision that, at first blush at least, seems to come very close to being an evasion of the statute. If this is actually what has happened, the ruling might have far reaching and, conceivably, revolutionary effects on the law of wills, especially in view of the uniformity with which the courts have always quashed attempted evasions of the statute.

The trust involved in the Pinckney case was created in 1928 by an instrument in which the settlor recites that he "assigns, transfers, conveys and sets over unto the trustee," personal property (of value of more than $40,000), "together with any and all additions thereto or substitutions therefor," in trust, to pay the net income to the settlor for life; and upon his death, if the trust be not revoked, from the corpus to set up other trusts and make distributions as therein directed. (The directions for these "other trusts" and "distributions" were duly set forth). The instrument was not executed in accordance with the statute of wills and, in fact, was conceded ly never intended as a will. By his actual will drawn up in 1930, the settlor of the trust directed that the trustee be requred to carry out all provisions of the trust.

The objection to the validity of the instrument is now set forth by a next of kin of the settlor, following the latter's death. The plaintiff was not made a beneficiary of the trust and he is anxious to have it upset so that the testator will be deemed to have died intestate as to the trust property, thus causing it to be distributed according to §98 of the Decedents Estate Law, under which he, as next of kin, would share in the distribution. The plaintiff's contention, as already indicated, is that as certain provisions of the trust were not to become effective until the death of the settlor, the trust is void for non-compliance with the statute of wills, which statute alone governs testamentary dispositions. In this connection, plaintiff points to the fact that the settlor reserved the right to revoke the trust, thus leaving himself in effect the owner of the property until his death - e.g., in this manner, the plaintiff seeks to show that the beneficiaries' rights depended entirely upon the settlor's death and, therefore, are purely testamentary.

The court, however, overruled these arguments and upheld the validity of the trust. In the first place, Mr. Justice McNamee in his opinion points out that the four requisites of a valid trust as set forth in Brown v. Spohr (180 N.Y.201, at 209), are all complied with. That is to say, the beneficiaries were designated, the trustee was named, the fund was properly identified, and the fund was legally assigned to the trustee with the intention of passing title. From this basis, the opinion proceeds to point out that by creating a valid trust during a settlor's lifetime, that settlor aliens his own title to the trust property. The mere fact, furthermore, that the right to revoke the trust is retained by the settlor fails to change the situation because, until the revocation is made, the title to the property is clearly in the trustee. In other words, the beneficiaries during the settlor's life have a vested equitable interest in the trust fund which is subject to defeat by revocation. Therefore, concludes Justice McNamee, in effect, the trust was completely executed during the life of the settlor and, all that happened at his death was that the beneficiaries' vested equitable interests became converted into tangible legal rights. This last transformation was clearly not of such testamentary nature as to require compliance with the statute of wills. Thus, the beneficiaries of the trust may now enforce it and the plaintiff's case is defeated.

An analysis of the steps in the opinion, as set forth in the preceding paragraph, indicates, I think, quite clearly, that as far as the law of trusts is concerned the trust herein involved was clearly in full compliance therewith. Furthermore, there seems to be no fault to be found with the proposition that the settlor's death merely turned a vested equitable interest into a vested legal right - and this can lawfully be accomplished under the rules of trusts without recourse to testamentary dispositions. But, conceding all this and granting that the court acted under sufficient precedent and authority within the established rules of law, the original question stands. Has the court upheld the validity of a method for evading the statute of wills?

Of course, under the analysis of the opinion, it can be seen that the disposition here was not testamentary. But the effect of the trust, on the other hand, has been to enable the settlor to give property to the beneficiaries, the actual benefits of the gifts not to take effect until after the settlor's death, and, during his life, he retains the benefits of the trust and the right to revoke it at any time. And, of course, he has done all this while violating the statute of wills to his heart's content. I do not question the logic and law of the opinion governing Pinckney v. City Bank Farmers Trust Company, but I must raise the question as to whether the statute of wills has been (at least technically) successfully evaded. My conclusion is that it has been.

M. S.

* * * *

WORKMEN'S COMPENSATION - PREVIOUS DISABILITY.- Section 10 of the Workmen's Compensation Law provides that "every employer subject to this chapter shall ..... secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment." The statute is one of public policy to prevent employees who have been dis-

abled in the course of their employment from becoming a public charge.

The amount awarded is based upon the extent of the disability. The degrees of disability are termed "permanent total disability," "permanent partial disability," "temporary total disability," and "temporary partial disability." Provision is made for the amount to be awarded for the loss of one hand, one arm, one leg, one eye, etc.

In Schwab v. Emporium Forestry Co. (167 A.D.614, 153 N.Y.Supp. 234, af'd 216 N.Y.712) the court considered the case of a claimant who had theretofore lost one hand, and who had lost the other hand in the course of his employment. The question was whether the award should be for permanent total disability or for a permanent partial disability. The court held that he was entitled to an award for total disability. Such a ruling could lead to an apparent injustice, for an employer would be required to pay for an injury which did not arise in the course of the employment. Why should the present employer be required to pay for the hand which the employee had previously lost? Then too, if the previous injury had been received in the course of the employment, the employee would have received an award for partial disability for the loss of the first hand. If the employee is permitted to recover for the loss of the second hand as for a total disability, he would be recovering twice for the loss of the first hand, and the employer would be paying twice.

Realizing the injustice of the situation as it existed at that time the Legislature by Chapter 615 of the Laws of 1915 sought to alleviate the situation by adopting Subdivision 7 of §15 of the Workmen's Compensation Law which reads as follows: "The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation for such injury when considered by itself and not in conjunction with the previous disability."

Under this section the award of compensation for a fractured hip was apportioned between two employers in a case where the hip was first fractured while the employee was in the employ of one, and was re-fractured in the employ of the other. (Anderson v. Babcock & Wilcox Company, 256 N.Y.146). The contest in that case was between the two employers and the right of the employee to recover was not in issue. The right of the employee to recover under such circumstances was directly raised in Schurick v. Bayer Co. (272 N.Y.217). There the employee who had fractured his wrist,-not in the course of his employment - returned to work after it had apparently, but not really, healed In the course of his employment his arm was broken, partly due to the previous fracture. The court interpreted the above quoted section to apply only to a case where the previous disability was the loss of one limb or one organ, and did not apply to a case such as this where the amount that the previous disability contributed to the present injury was purely speculative. They distinguish the Anderson v. Babcock & Wilcox Co. case upon the ground that the case was a contest between a previous and a present employer.

It seems that the courst will not construe Subdivision 7 of §15

of the Workmen's Compensation Law to the unnecessary detriment of the employee. Apparently they will apply it only to a case such as that which led to its adoption.

N. H.

* * * *

DECLARATORY JUDGMENTS.- Of procedural interest, Reed v. Littleton (249 App. Div. 310), and Woollard v. Schaffer Stores Co.(272 N.Y. 304) are respectively to the effect that under §473 C.P.A., and Rule 212 of the Rules of Civil Practice with its specific provision for discretionary jurisdiction, a person may not obtain a declaratory judgment for the purpose of determining in advance whether certain acts do or do not constitute a crime, but that there is power to declare rights and other legal relations arising from a contractual relationship even though an adequate remedy is already provided by another form of action.

The plaintiff in the Reed case (supra) was unsuccessfully prosecuted by a district attorney for selling options on dogs which raced at plaintiff's track. The result of the option scheme would have been no different had bets been frankly and openly made and paid. Further prosecution was threatened, but plaintiff continued the races and option selling during the pendency of his action for a declaratory judgment. This case is the first instance of record in New York wherein it was sought to have it declared in a civil action that a crime had or had not been committed, and it follows from the dismissal of the complaint that all in the position of the plaintiff herein can have innocence established only in a court of criminal jurisdiction. The propriety of a holding that a district attorney is not to be prevented from prosecuting by this type of action is beyond question.

The defendant lessee in the Woollard case (supra) violated terms of the lease relative to subletting and structural alterations. The lease provided for monthly payments of rent in a fixed amount, plus one per cent of gross sales on the entire premises, and contained a covenant that if the defendant should fail to conduct its business as therein provided, it would pay the plaintiff, in place of the one per cent, twenty-five dollars for every business day on which business was not "so conducted." The plaintiff demanded that the defendant leave the premises, and upon the latter's failure to vacate arose a disagreement concerning the amount due, plaintiff's endorsement of subsequent checks indicating that they were received "subject to litigation pending." In the action for a declaratory judgment, the complaint prays for a determination of the rights of the parties; the effect of subletting and structural alterations upon the right to terminate the lease; whether it has been effectively canceled; plaintiff's right to receive the twenty-five dollars daily instead of the one per cent. The defendant suggested that either summary proceedings or ejectment would be the proper form of action.

The reversal on the merits in James v. Alderton Dock Yards, (256 N.Y.298) was necessarily upon the ground that the plaintiff therein was under no circumstances entitled to the equitable lien which he sought; the case is distinctly not a limitation upon the use of a declaratory judgment.

When such a judgment was sought in Colson v. Pelgram (259 N.Y. 370) another action between the same parties was actually pending in which all the issues could be determined, and it was held to be an abuse of discretion to entertain jurisdiction.

Newburger v. Lubell (257 N.Y.383) is not authority for saying that the numerous issues arising from the pleading in the case at bar are not sufficient to confer upon the court power to entertain jurisdiction. Among the forms of action which the court found to be reasonably adequate and open to the plaintiff in the Newburger case was resort to arbitration as provided for in the written agreement underlying the transactions between the parties. The two cases may be alike insofar as the existence of a genuine controversy is concerned, although that point is not clearly established in the earlier adjudication, but in the facts of the instant case not only is there no provision concerning any specific form of relief in case of disagreement, but there is actually a dispute as to the type of litigation which should be proper. The holding of the Court of Appeals that the inferior courts did have jurisdiction to entertain the action is based upon Rule 212, under the provisions of which the difference in the decisions is reconcilable.

J. T. G.

* * * *

TAXATION OF INTANGIBLES - BUSINESS SITUS - EXCHANGE MEMBERSHIPS.- In the recent case of New York ex. rel. Whitney v. Graves (81 L.Ed.195) the United States Supreme Court upheld a striking application of the rule that intangible personal property may be taxed at its "business situs."

The property in question was a membership on the New York Stock Exchange which was owned by the relator, a resident of Massachusetts. The relator, in challenging the jurisdiction of the State of New York to tax the profits arising from a sale thereof, stressed the points that he and his co-partners had never had an office nor abode in New York; that while they advertise themselves in Boston as members of the New York Stock Exchange and accept orders from customers at their Boston office for execution on the New York Exchange, none of that business is conducted by the relator or his co-partners on the floor of the Exchange; that they do not buy and sell securities on the Exchange for their firm account; that orders requiring execution on the Exchange are telegraphed to members of the Exchange who have business offices in New York and who execute their orders on the exchange in their own names, acting as correspondents. On these facts the relator contended that the membership cannot be said to have a business situs in New York.

The court, however, upheld the constitutionality of the tax on the ground that although the relator was domiciled in Massachusetts and did no business in New York yet the right to do business on the New York exchange which was evidenced by a membership was a privilege which by its very nature was localized at the Exchange in New York. The court in considering the nature of a right that has a business situs said: "The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself.

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The case of Rogers v. Hennepin Co. (240 U.S.184) involved a similar question. In that case a tax was levied upon a membership in the Chamber of Commerce in the City of Minneapolis, which membership included the right to trade on the floor of the grain exchange. It was argued in behalf of non-resident members that their memberships were intangible rights held at their domicile and not taxable. The court there held that the memberships were taxable in Minnesota. That case differed, however, from the Whitney case in that it appeared that the non-resident members in the Rogers case occasionally exercised their rights on the exchange personally while the relator in the Whitney case never did.

Thus, it can be seen that the case in question really goes further than the Rogers case in that it decided that the membership had a business situs in New York State and was taxable here although the right was never personally exercised by the owner in this State. True the relator did profit indirectly through a lower rate of commission on stock orders which he had executed by his correspondents in New York but the court did not stress this fact in its decision. To our mind the case contains a reasonable determination. The principle under which the tax was levied being well established the Court was powerless to reasonably arrive at any other conclusion. The right although purely intangible was inherently attached to the New York Stock Exchange. It was valuable in New York but valuless in any other place. It is difficult to see how anything could be more completely localized in New York State that was not itself tangibly located within its boundaries.

E. S. D.

* * * *

NEGLIGENCE - SOVEREIGN IMMUNITY - DEFECTIVE TRAFFIC LIGHTS.- In the recent case of Dorminney v. City of Montgomery (--Ala.-- 166 So. 689), the Supreme Court of Alabama laid down a subtle distinction between maintenance of a highway and regulating the use of a highway. In that case, plaintiff approached a cross street and, relying on the fact that she was driving on a boulevard, continued to cross, seeing no signal to stop. Her car was struck by an automobile proceeding on the cross street across the boulevard. The driver of the latter car relied on a green signal. Mrs. Dorminney had seen no stop signal because the red light facing the boulevard was not working. Although she alleged negligence on the part of the city, her complaint was dismissed on the ground that in regulating traffic the city was exercising a governmental, rather than a ministerial duty, and in the eyes of the law, no wrong could be done in the exercise of governmental duties, no matter how much actual negligence was present.

Mr. Justice Knight, in his opinion, points out that in regulating the use of the street the city was not "maintaining a highway" and that in so regulating, no ministerial function is present. The reason asserted throughout the opinion is that the defect here was not physical. The court apparently lost sight of the fact that originally, all maintenance of the highway was a governmental function (Peatty v. City of New York, 33 Misc.231) and that it is by statute that most of the states have assumed the liability for defects in the highway and have imposed the same liabilities on cities and towns. In New York, the liability is assumed and imposed by

§§58 and 215 of the Highway Law. To my mind, the mere fact that a defect is one of tangible substance rather than of intangible lack of light is a rather weak argument for denying liability. It might just as well be said that there is no liability for leaving a hole in the road, for a hole is an empty space and is intangible.

The opinion cites but two cases which support it. One is City of Rome v. Potts (45 Ga.App.406, 165 S.E.131) which merely states arbitrarily, categorically, without argument, and merely as obiter dicta that maintenance of a traffic light is a governmental function. The other supporting case cited is Auslander v. City of St. Louis (332 Mo. 145, 56 S.W. 2d 778). That opinion is based on similar facts and cites exactly the same cases as the Dorminney case and also is wholly devoid of argument, merely stating flatly that the case is not one of a physical defect.

The other cases which Mr. Justice Knight cites to support his conclusion and which are relied on in the Auslander case are not at all in point. One, Healley v. Kansas City (277 Mo.619, 211 S.W.59), holds that controlling a sham battle at a Fourth of July celebration is a governmental function. A second, Hanson v. Berry (54 N.D.487, 209 N.W.1002) holds that a policeman driving a squad car to the scene of a crime was engaged in a governmental duty. A third, Mayor of Savannah v. Jones (149 Ga. 199, 99 S.E.294) holds that even though maintaining a refuse box or waste basket on the street be a governmental duty, the city was liable when the box was maintained in such a way as to obstruct the highway.

There are no New York cases directly in point, but there is some indication that New York would not follow the Alabama and Missouri courts, but would refuse to draw such a fine distinction in reasoning with so little basis in justice. Before the enactment of §12-a of the Court of Claims Act, waiving freedom from suit, at least so far as state employees were concerned, our courts did hold that the State was not liable for negligent operation of its trucks on the State highway (Minchell v. State of New York, 123 Misc. 177), but there is an obvious distinction between negligent maintenance of a dangerous condition in the road and negligent use of a safe road.

In Sporborg v. State of New York (226 App. Div. 113) the State was held liable for failure to maintain signs warning plaintiff of danger. In Miller v. State of New York (231 App. Div. 363), plaintiff unexpectedly and without warning came upon some construction and was injured. A like result followed from failure to give warning of a dangerous condition which the State was justified in maintaining.

A strong indication of the view taken of the statute imposing on towns and cities liability for defects is found in Whitney v. Town of Ticonderoga (127 N.Y.40). A road scraper had there been left in a road otherwise properly constructed and maintained. The question of negligence was determined in plaintiff's favor and liability alone was questioned in the Court of Appeals. Defendant's counsel argued that this was not a defect and thus the town was not liable. The court rejected the argument in an opinion by Judge Bradley, by stating, "the term 'defective highways' was used in reference to their condition for public travel upon them,which their designation as a highway imports, and in view of the purpose for which they are established and maintained."

Thus even if §12-a of the Court of Claims Act be construed as not referring to the agents of cities, it would seem that a city would be liable in New York for maintaining a defective traffic light. A highway with defective traffic signals is as much a defective highway, insofar as the traveling public is concerned as one with no warning signals at all. A defective traffic signal is as much a defect in the highway,- again insofar as the same traveling public is concerned - as a road scraper left on the surface. In neither event is the highway being maintained in a safe and proper condition.

There is certainly no justice in denying a recovery to an injured person by hiding behind the skirts of sovereign immunity in the case of a traffic light and whisking away that protective skirt in the case of a total lack of signals. No great calamity would befall the defendant, for it is inconceivable that enough such accidents could happen at the same time to bankrupt the city treasury. To hold the municipality liable would not be to make it suffer unjustly, for the liability is in negligence and fault would be wholly that of the defendant or no recovery could be had regardless of any claim of sovereign immunity.

M. M. Z. L.

* * * *

ANSWERS

1. Semble. (Chamberlin v. Andrews, 271 N.Y.1; af'd per curiam by an equally divided court, 57 S.Ct.122)
Note.- Such a decision although "as between the parties, a conclusive determination and adjudication of the matter adjudged" does not become "an authority for the determination of other cases." (Hertz v. Woodman, 218 U.S.205).

2. No. (New York ex Rel. Rogers v. Graves, 81 L.Ed.202, reversing 245 A.D.452, Cf. Albany Law Review April, 1936).

3. (a) -1. No. Leisy v. Hardin, (135 U.S.100)
-2. Yes. Clark Dist. v. R.R. (242 U.S.311)
(b) Yes. U.S. v. Lanza (260 U.S.377).
(c) Yes. State Board v. Young's Market (57 S.Ct.76).

4. (a) No. U.S. v. Chavez (228 U.S.525).
(b) Yes. U.S. v. Curtiss-Wright (81 L.Ed. 166). Cf. Law Review, page 78.

5. (a) Yes. People v. Koerber (244 N.Y.147).
(b) No. People v. Stevens (272 N.Y.373). Cf. Law Review P. 72.

6. No. Matter of Montgomery (272 N.Y.323). Cf. Law Review P. 89.

7. Yes. Vaughn v. State (272 N.Y.102) Cf. Law Review P.85.

8. (a) No. According to Mortgage Co. v. Chotiner (64 Pac.(2d) 138).
(b) Yes. id. Law Review, page 66.

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THE WAGNER ACT - COLLECTIVE BARGAINING

DIRECT EFFECT ON INTERSTATE COMMERCE

On April 12, 1937, when reports of the activities of striking labor had shared newspaper pages with arguments for and against the President's proposed change of the Federal judiciary system, and three different Circuit Courts of Appeals of that system, in deciding the three "manufacturing cases" under the Wagner Act had relied exclusively upon the decisions of the Supreme Court in the Carter case (298 U.S.238) and in Schechter Poultry Corp. v. United States (295 U.S. 495), the highest tribunal in five instances unexpectedly upheld the validity of the legislation enacted in July of 1935 for the purpose of enlarging §7a of the NRA as an aid to the organization of labor.

Since Congress was given the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes," (U.S.Const. Art.I §8) the commerce clause has been variously interpreted in decisions as famous as Gibbons v. Ogden (9 Wheat. 1, 6 L.Ed.23), but startling and important, because of the then existing conditions, as was the adjudication a century ago that the transportation of passengers constituted a part of interstate commerce, of still greater and yet uncertain import is the holding that under the same grant of power Congress can regulate the relations of local employment. In the three "manufacturing cases," (Nat'l Labor Relations Board v. Jones & Laughlin Steel Corp., 81 L.Ed.563, U.S. ; Board v. Fruehauf Trailer Co., 81 L.Ed.582, U.S. ; and Board v. Friedman-Harry Marks Clothing Co., Inc., 81 L.Ed.585, U.S.), the decisions were five-to-four. The Associated Press v. Board (81 L.Ed.603, U.S.), raised the additional questions of freedom of speech and of the press, and deprivation of property without due process of law. The result therein constituted the fourth five-to-four decision.

The decision in Washington, Virginia & Maryland Coach Co. v. Board (81 L.Ed.601, U.S.) was unanimous; the petitioner conceded its activities in interstate commerce. The unanimity in this instance followed naturally from the holding, in Virginian Ry. Co. v. System Federation No. 40 (81 L.Ed.470, U.S.), that the provisions of the Railway Labor Act making it mandatory upon an interstate carrier to treat with those certified by the National Mediation Board to be the representatives of a craft or class of its employees are within the power of Congress over interstate commerce. The status of the right of collective bargaining when that right is sought to be exercised in a business concededly interstate in character is not uncertain. The problem arising under the Wagner Act is the necessity of deciding what in fact either constitutes interstate commerce or directly affects it. The requirements of an increase in intrastate rates so as to bring them to the level of interstate rates, and the numerous cases arising under the Federal Safety Appliance Act provide examples of conditions which - while not a constituent part of interstate commerce,-nevertheless directly affect it.

The following provisions are included in the Wagner Act:
(a) employees are to have the right to self-organization, to bargain

collectively with representatives of their own choosing, and to engage in activities for such purposes;

(b) employers are not to restrain employees in the exercise of those rights nor are they to refuse to bargain collectively;

(c) those representatives designated to bargain collectively by the majority of the employes in a business are to be the exclusive representatives of all employees in that particular unit;

(d) the National Labor Relations Board is given power to decide the proper units for collective bargaining and to prevent "unfair labor practices as defined in section seven of the Act.

The corporation in the Jones case (supra) was charged with having discriminated against the members of a lodge affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America with regard to hire and tenure of employment, and with having coerced and intimidated its employees in order to interfere with their self-organization, culminating in the discharge of ten of some ten thousand workers in one of its particular plants. The corporation appeared specially for the purpose of objecting to the jurisdiction of the Board, and following its withdrawal from the proceeding, the Board concluded from the evidence that the works of the corporation and its nineteen subsidiaries "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated." In contesting the adverse ruling which followed, the corporation's chief arguments are these:

(a) that the Act is in reality a regulation of labor regulations and not of interstate commerce;

(b) That the Act can have no application to the corporation's relations with its production employees because they are not subject to regulation by the Federal Government.

The corporation pointed out that in the earlier Carter case (supra) the court had said that "working conditions are obviously local conditions..... Such effect as they may have upon commerce, however extreme it may be, is secondary and indirect." The dissenting justices in the case at bar held the departure from that case and the Schechter case (supra) without foundation, Justice McReynolds saying at page 599: "It is gravely stated that experience teaches that if an employer discourages membership in 'any organization of any kind in which employees participate,' discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything -- marriage, birth, death -- may in some fashion affect commerce."

But the prevailing view held that despite the fact that the work of the ten employees discharged by the corporation was wholly confined to one locality, the corporation was engaged in interstate activities in collecting raw materials and in merchandising the fin-

ished product. It is thus apparent that the manufacturing cases turned on these words of the Chief Justice at page 575: "Although activities may be intrastate in character when separately considered if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.... When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"

Accepting the above excerpt as representing the trend of thought behind the prevailing decisions in the manufacturing cases, the apparent broadness of the words is somewhat limited insofar as it is evident that the majority did not hold that manufacturing in and of itself constitutes interstate commerce. Neither did the prevailing justices say that Congress has power to regulate the process alone, but on the contrary while Government counsel strongly contended that the centers at which the plants involved are located, are in effect points through which the "stream of commerce passes," the Court said that the power of Congress "is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce."

By §2 Subd.6 of the Act, the Board's authority in dealing with labor practices is limited to those "affecting commerce," and that phrase is in turn defined as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The power of Congress over interstate commerce is plenary, but the question as to whether or not legislation concerning that power is appropriate to its protection and advancement has consistently been recognized to be one of degree It is because of that recognition that these five-to-four decisions leave much uncertainty and provide appealing arguments in support of the minority view. Thus, considering only the time element, the Supreme Court decided the Carter case (supra) on May 18, 1936, and i approximately eleven months there has been a practical reversal. The majority in so changing holds the earlier decision to be not controlling since the provisions of the Guffey Act were invalid because of improper delegation of the legislative power and inconsistency with due process, and in addition disregards the authority of the slightly earlier Schechter case (supra) on the ground that the activities of those petitioners under the Live Poultry Code did have something to do with interstate commerce, but were so remote as to be beyond Federal regulation.

The activities of the corporation insofar as its Aliquippa plant in Pennsylvania is concerned are really carried on in three steps: there the raw material from other states is received;there it is fabricated; from that point the finished products go to other states. The Federal power sought to be exercised in the Schechter case (supra) had to do with goods which had moved in interstate commerce. In the Carter case (supra) the products had not yet begun to move in that commerce. In both the question related to wages and hours of labor. In the instant case the question shifts to that of collective bargaining, and the products are those which not only

have moved in interstate commerce but which are to continue such transportation. Assume an accumulation of products in various stages of production at this particular plant; could the act of a group of employees in destroying those goods and the factory, be made an offense under a Federal law solely because the flow of goods in interstate commerce would have been interrupted? Although §13 of the Act provides that it shall not be construed so as to interfere with or impede or diminish in any way the right to strike, could the employees be prevented from refusing to work because of a similar effect on interstate commerce? And approaching the question of wages, and assuming the corporation found it impossible to continue operations under the present scale, where does power lie to compel a reduction? The answers to these questions lie solely in the future interpretation of the words "direct effect, indirect effect, degree," as continued litigation arises under more extensive legislation. There are few related cases which better illustrate the difficulty in reconciling decisions in that field of the law in which the courts resort to the process of inclusion and exclusion, deciding each case upon its own particular facts.

As to the possibility that one result of these decisions may be the bringing about of uniformity among the states on minimum wages and hours of labor, it is to be recalled that in the Schechter and Carter cases (supra), wages and hours of labor, as incidents of employment in the sale of poultry and the mining of coal, were held not to have a "direct effect" on interstate commerce. While in the three manufacturing cases, collective bargaining as a third incident of employment was held to have such "direct effect," it appears that the Government counsel made it very plain in the argument of the appeals in the Wagner Act cases that their contentions did not include "the implication that the Federal power extends to the fixing of wages on the grounds that the differences between employers and employees over wages cause industrial strife." Insofar as the weekly wages received by any employee are concerned, the primary effect of an increase or reduction in those wages will be a change in the economic status of him and his family, and not the cessation or more rapid movement of interstate commerce. But this immediate effect will not necessarily be the sole result. To say that the very subject of wages will not become in any given case the only basis of dispute between the employer and the collective bargaining agency, and that a strike tying up commerce would be an improbable consequence is to refer indirectly to the "intellectual vacuum" mentioned by the Chief Justice. Experience shows that the nicety of distinction which may exist in theory rapidly vanishes when disagreement over the means of livelihood becomes a reality.

Not only did the decisions in the previous N.R.A. cases have no controlling effect on these later rulings, but the cases of Adair v. United States (208 U.S.161) and Coppage v. Kansas (236 U.S.1), holding respectively that Congress could not make it a criminal offense against the United States for an interstate carrier to discharge an employee from its service simply because of his membership in a labor organization, and that a state statute which declares it a misdemeano to require an employee to agree not to become a member of a labor organization during the time of his employment was violative of the due process clause, were quite simply said to be not applicable to legislation of this character whose chief purpose is the subject of investigation.

Whatever opinion one may have concerning the split in the decisions, an equally important element consists in the results which will follow from the present legislation, and from future enactments encouraged by the holding of constitutionality. The subjects to which Congressional control based upon the commerce clause may be extended hereafter has now become a matter of speculation. Even as to the probable scope of the present Act there is diversity of opinion. Following a discussion by prominent industrial lawyers, the New York Times on April 18, 1937, printed, as compiled by those men, a classification of industry, each group having such characteristics as may make its business interstate within this interpretation The groups are as follows:

(1) Integrated Industries: This classification includes such industrial plants as those making glass or other accessory parts for the automobile industry. These plants might be classed as intrastate in themselves, but the fact that they make a part which eventually goes into a product classified as interstate in commerce brings them under the Supreme Court's definition. The classification includes also such industries as the captive coal mines owned by the steel corporations. Rayon dyers and cotton treaters and makers of cotton mill machinery and similar businesses whose owners might claim an intrastate classification might be declared in interstate commerce because of their contributions to industries that are.

(2) Industries with plants in several States. Examples of such businesses would be certain building material companies whic have local plants serving local intrastate territory whose whole activity from the obtaining of raw materials to the shipping and marketing is contained within a State. The fact that such plants are owned by a single company operating in several States would in the opinion of these lawyers make them all "interstate" under the decisions.

(3) Local industries which employ members of national labor unions. The action of the union and its relations with its employer - intrastate though the employer might be - would have certain effects on other unions in other States and therefore is under the Federal jurisdiction as far as labor relations are concerned.

(4) Plants which are locally owned and which use raw materials from within the State and which market their products within the State but which have a long history of labor troubles. The textile industry furnishes an example.

(5) An industry selling the bulk of its goods in interstate commerce. The Friedman-Harry Marks Clothing Co., Inc., in Board v. Marks Co. (supra), brings about ninety-nine percent of its raw materials across State lines and sells more than eighty percent of its finished goods beyond the State in which it operates. This company is an example of the small business, of which there are thousands,which will henceforth be classed as interstate.

(6) Plants in which labor practices tend to cause disputes in other plants or even in other and kindred industries. It is conceivable, these lawyers say, that a labor dispute in the oil industry, for instance, might result in obstructions to

commerce or a disturbance of labor conditions in coal mining If this were found to be so, then an oil company wholly owned and operated intrastate and selling oil for consumption locally would be subject to Federal control.

A reading of the Act makes it very apparent that the restrictions are placed solely upon the employer. While it is true that the provisions as drawn neither interfere with the right of the employer to hire and to discharge nor authorize the Board to interfere with the right to end the contract of employment for reasons other than those stated in the Act, in order that complete equity may be accomplished in an industrial policy national in scope, there seems to be a necessity for additional legislation designed to outline and protect the rights of the employers. The fact that the plan could originally have been more comprehensive was of course no reason for holding invalid such legislation as was enacted once the necessary "direct effect" was found, but the continuance of a unilateral system covering labor, while not protecting capital, will be impossible.

It does not follow that all steps the Board may take will be constitutional, for its activities may assume objectionable and unconstitutional features although it operates under a constitutional law. At the present time the American Federation of Labor and the Committee for Industrial Organization are seeking and gaining power unprecedented in our industrial branches, and the effect of the Act on the activities of these groups, the relations of one or the other or both with the Board itself must also depend upon future developments. Since it is the function of the Board to decide what agency shall represent a given branch of labor insofar as collective bargaining is concerned, as the two major organizations react to the increase in membership there is a possibility than an arbiter between the organizations themselves may become necessary, and that the members of the Board be the mediators, a possibility not easy of solution.

The latest interpretation of the commerce clause is broad to the extent of surprise, but insofar as the President's court program is concerned it may well be that the expansion was insufficiently great or determined by too small a majority. It is to be noted that there is no provision in the reorganization plan as it now stands which would prevent a single vote from deciding cases equally as important, and Justice Roberts, whose vote caused the swing, has often previously been one of the majority of five conservatists.

Considering all the possibilities attendant upon this legislation should history be so recorded that another generation looks upon these decisions as we now regard Gibbons v. Ogden (supra), it will be said that Justice McReynolds has written prophetically concerning rights now hold fundamental and a division of power between State and Federal Governments which we hold basic when he says "The saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

JAMES TERRENCE GRIFFIN

CORPORATE FIDUCIARIES - BONDS AND MORTGAGES

RIGHT TO PURCHASE FROM THEMSELVES FOR THE BENEFIT OF TRUST ESTATES

It has long been settled and upon principles which cannot be contraverted, that a trustee cannot deal in its own behalf with the funds entrusted to his charge for the benefit of another. He can neither buy the trust funds for himself nor exchange them for his own property. This principle of law, long since become public policy, is found in the decisions of the earliest English courts. It is now embodied in our statutes and may be found in §21 of the Personal Property Law and §111 of the Decedent Estate Law.

Section21 of the Personal Property law succinctly states "But no trustee shall purchase securities hereinunder from himself.

Section 111 of the Decedent Estate Law which is practically identical in terms to §21 of the Personal Property Law, contains the same statement "But no trustee shall purchase securities hereunder from himself."

The difficulty, however, arises in determining whether banks and trust companies are rigidly bound to the rule stated above. There is no doubt that, since the amendment to Subd. 7 of §188 of the Banking Law, as enacted by Chap.898 of the Laws of 1936 in effect September 1, 1936, a corporate fiduciary cannot purchase securities from itself for that Law specifically provided "But no corporate fiduciary shall purchase securities from itself."

Prior to the Amendment of 1936 no such provision was incoporated in §188. The problem here is to determine whether or not a corporate fiduciary could so purchase from itself prior to September 1, 1936.

Before the 1936 Amendment, Subd. 7 of §188 of the Banking Law provided in part, "Investments in bond and mortgage by any such corporation (chartered corporate fiduciary) as...truste.... may be made by apportioning or by transferring to any estate or fund so held a part interest in a bond and mortgage held by or in the name of such corporation individually or in any representative capacity ....and any such corporation shall promptly notify each person of full age and sound mind entitled to the income therefrom of the fact that such investment has been made." This portion of Subd.7 of §188 was enacted by Chap.385 of the Laws of 1917 and was operative until the Amendment of 1936.

From an analysis of this section of the Banking Law it may be seen that between 1917 and 1936 corporate fiduciaries were permitted to purchase part mortgages or mortgage participations from themselves without violating the statutes. It has been seriously contended that the Legislature must have intended to permit corporate trustees to purchase from themselves not only part mortgages but entire mortgages as well (between the years 1917 and 1936). The trustee in Re Tuttle's Estate (294 N.Y.Supp.230) urged the absurdity of a construction which would permit a corporate fi-

duciary to purchase from itself part interests in a bond and mortgage to the extent of 99% of a mortgage but which would not permit the purchase of a whole mortgage. To ascertain the validity of this contention it is necessary to resort to the case law.

In Re Roche's Will (245 App. Div. 192) a brief per curiam opinion of the Appellate Division, Fourth Department, after quoting parts of §21 of the Personal Property Law and Subd. 7 of §188 of th Banking Law, stated that the trustee had purchased from itself, in behalf of the estate, certain entire bonds and mortgages and had al so invested estate funds in mortgage participations without giving the statutory notice. The opinion proceeded to state "These transactions fall within the condemnation of the statutes quoted." The court modified the decree of the Surrogate of Onondaga County by surcharging the trustee with the amounts of these mortgages and mortgage participations.

In Re Peck's Will (152 Misc.315), the opinion of which was written June 20, 1934 by Surrogate Slater of Westchester County, (not appealed), it appeared that the Mount Vernon Trust Company as sole qualifying trustee purchased six entire mortgages, totaling $52,800, from itself for trust investment. The purchases were made between June 23, 1930 and February 2, 1933. There was no evidence of fraud, bad faith, or imprudence. The mortgages depreciated in value and the beneficiaries sought to surcharge the trustees. The primary objection was that the trustee purchased from itself. Under these circumstances Surrogate Slater stated "There is a well established equitable principle which properly precludes a trustee from investing trust funds in securities which are the individual property of the trustee. Only by this uncompromising rule of rigidity has the rule of individual loyalty been maintained against disintegrating erosion. The provisions of the will, liberal as they are, and, even if more so, could not overcome the public policy of the State upon the subject that a trustee of the estate cannot deal with itself." The bonds and mortgages purchased by the trustee from itself, were held to be the property of the trustee and the trustee was surcharged in the sum of $52,800 with interest from the date of purchase less the income therefrom which had been paid to the beneficiary.

In Matter of Flint's Will (240 App.Div. 217) decided by the Appellate Division, Second Department, wherein a trustee had purchased parts of mortgages from itself for trust investment, certain dicta were enunciated by the Court which are rather misleading. The Court in speaking of the phrase "But no trustee shall purchase securities hereunder from himself" used in both the Personal Propert and the Decedent Estate Laws stated "The prohibition, therefore, i the two other statutes does not apply to a corporate trustee who does not act under them but acts under the Banking Law. It applies to an individual trustee who necessarily acts under the Personal Property Law and the Decedent Estate Law and is subject to this clause. The wisdom of applying a different rule in respect of legal investments, as between a corporate trustee and an individual trustee is a matter for the Legislature."

This language was thought to indicate that the Court considere that the common-law rule prohibiting a trustee from dealing with himself was inapplicable to a corporate fiduciary in making mortgag investments. However, it should be noted that purchases of entire

mortgages were not involved nor was it stated that freedom from the common-law restriction applied to purchases of both entire and participation mortgages.

Further, this same Court in a subsequent opinion (Matter of Balfe's Will, 245 App.Div.22) construed the statute strictly in a case involving purchase of whole mortgages. In the Balfe case the Court was considering the affairs of two estates arising upon the death of a husband and wife. The trustee had purchased entire mortgages for the estates from its subsidiary of which the deceased husband had been a director. The husband's will had specifically authorized the trustee so to purchase from itself. The will of the wife had authorized the trustee to make investments without regard to the general rules of law or any statute applicable thereto." In respect to the estate of the husband the entire Court was in agreement with the majority of the Court in its statement, "The purchase of (entire) mortgages from itself, otherwise illegal, became lawful perforce the provisions in the will making inapplicable the case law and statutory safeguards." The dissenters contended that the provision in the will of the wife authorizing investments without regard to "the general rules of law or any statute applicable thereto" was not sufficient to authorize the trustee to purchase from itself. Thus it may be seen that although the majority of the Court held that the trustee was not liable for purchases of entire mortgages, nevertheless, it recognized the general rule of liability in such cases but refused to apply it because of the particular provisions in the wills of the testators.

The most recent case on the point In Re Tuttle's Estate (294 N.Y.Supp. 230) decided by Surrogate Delehanty of New York County on February 9, 1937. The Title Guaranty & Trust Company as trustee under the Will of George M. Tuttle purchased certain entire bonds and mortgages from itself in 1926. It was contended by objectants to the accounting that transactions of this sort were illegal and that the trustee must restore the amount of such investments with interest. After quoting from Matter of Flint, In Re Roche's Will, and In Re Balfe's Estate (supra) the Surrogate proceeded to state, "The court has a great deal of sympathy with the contention of the trustee that it would be unreasonable to a fiduciary to purchase fractions of mortgages for individual trusts to the extent of the whole mortgage but forbade the purchase of a whole mortgage for a single trust. The contention that there is neither practical nor logical reason for such construction would be entitled to great right if it were not for these Appellate decisions on which comment has been made. While the question has not been concluded in this Department (First Department), any difference of viewpoint from that expressed by the Second and Fourth Department ought to come from the Appellate Court and not from the trial judge.

In conclusion, several statements may be made. Between 1917 and September 1, 1936 corporate trustees were permitted to purchase part mortgages in behalf of trusts and estates from themselves. Subsequent to September 1, 1936 no mortgages, part or whole, could be purchased from themselves. Prior to September 1, 1936 the liability of trustees in purchasing entire mortgages from themselves is far from clearly settled. Surrogate Slater of Westchester County has unqualifiedly held (Re Peck's Will, supra) that such a purchase by a corporate trustee rendered the trustee liable to a surcharge. The

Appellate Division, Second Department, has taken the same position (In Re Roche's Will, supra). The general rule was again recognized by the same Department in Re Balfe's Will, (supra) but the rule was not applied because of the peculiar relation of the testators to the trustee and because of the plenary powers given in the will. Surrogate Delehanty in Re Tuttle's Estate (supra) contended that the Legislature must have reasonably intended that corporate trustees might so purchase whole mortgages, but he refused to enforce his contention because of the opposing opinions of other Departments of the Appellate Division. He preferred to allow the Appellate Division to decide the rule for his Department. Although the question of the liability of corporate trustees which have purchased estate mortgages from themselves is far from clearly decided until a decision is rendered by the Court of Appeals the weight of authority renders corporate trustees liable for such purchases.

THOMAS JOSEPH CROWLEY, JR.

CHARITABLE INSTITUTIONS - IMMUNITY FROM SUIT

One of the deepest-rooted theories of the law is that of the immunity of public charitable institutions from suit. This principle was founded as early as the very law itself, for from time immemoria comes the saying "The king can do no wrong." The reason for the rule then was exactly as the quotation states, because the king owned everything, hence every right was in him and any wrong that he might commit would be a wrong against himself and, therefore, there could be no redress.

From this single rule of law has branched the various immunities from suit that have come down to us and which we adopt as a matter of public policy. But this rule has come to embrace diverse persons and bodies as the ancient sovereign was replaced by various forms of government. As civilization and education grew, the people's eyes were opened and the almightiness of the king was lost. Republican and other forms of government took the place of the king and, to render more secure the foundation upon which they stood, the old rule of immunity from suit was continued in their favor. Even i the case of the modern government we find vestiges of the allpowerfu ness of the ruler as the reason for giving it this favored position. The immunity of the state includes not only exemption from suit, but from liability for tort as well. In respect to the state itself, whatever wrong is attempted in its name, is imputable to its government and not to the state, for as it can speak and adt only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law,-the Constitution,- is not the word or deed of the state, but is the mere wrong of those individual persons who falsely speak and act in its name. (Litchfield v. Bond, 186 N.Y.66).

The immunity granted in our American governments is not absolut because the government may waive, and in many cases has waived, this immunity. The State of New York has assumed liability for its torts by adopting the present §12-a of the Court of Claims Act, as follows "The State hereby waives its immunity from liability for the torts o its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the Supreme Court against an individual or a corporation, and the State hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims against the State to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the State while acting as such officers or employees. Such claim must be submitted pursuant to the procedural provisions of the Court of Claims Act; provided, however, that no action shall be maintained against the State for damages or injuries pursuant to this section unless a written claim or a written notice of intention to file claim, duly verified and containing the information required by §15 of this Act, shall be served upon the Attorney-General and the Superintendent of Public Works within sixty days after the alleged injury occurred, no unless the claim shall be filed thereon within two years after the happening of the event which caused the injury." This places a liability upon the State similar to that which is applied under the doctrine of respondeat superior.

In the convenient exercise of the powers of government and the administration of local affairs, the State is divided into various political subdivisions - counties, towns, cities, and villages. Each of these subdivisions exercises a portion of the sovereignty of the State, and, insofar as this obtains, they possess immunity from liability for torts. Cities and villages stand upon a somewhat different footing. They are full corporations, possessing charters and franchises. They exercise two kinds of power. First, those granted for public or political purpose, in the exercise of which they are not liable for their tortious acts. Second, those granted for private advantage, belonging to the corporate body in its private capacity and in relation to which it is responsible like a private individual or corporation. (Markey v. County of Queens, 154 N.Y.675). Statutes have been enacted whereby the immunity from suit enjoyed by these public corporations has been greatly limited. "Every city, town, and village shall be liable for negligence of a person duly appointed by the governing board or body of the municipality, or by any board, body, commission or other officer thereof, to operate a municipally owned vehicle upon the public streets and highways of th municipality in the discharge of a statutory duty imposed upon the municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties, and within the scope of his employment. Every such appointee shall, for the purpos of this section, be deemed an employee of the municipality, notwithstanding the vehicle was being operated in the discharge of a public duty for the benefit of all citizens of the community and the municipality derived no special benefit in its corporate capacity." (Highway Law §282). It will be noted that the liability is imposed by this section even though the injury occurred in the performance of a public service and even though the municipality derived no profit from that service. Another waiver of liability will be found in §74 of the Highway Law which is as follows: "Every town shall be liable for all the damages to persons or property sustained by reason of any defect in its highways or bridges, existing because of the neglect of any town superintendent of such town....."

The rule is also extended in behalf of those persons, organizations, etc., which while private in their nature perform governmental functions. Then too, the class of corporations referred to as charitable are exempt from liability for the torts of their agents or servants on grounds of public policy. The service which they perform may not be strictly governmental and yet it is so desirable that their actions should not be curtailed by lawsuits by individual Under this class are grouped hospitals, schools, and any public organization which is not organized for profit. In the cases involvin this class of charities many cases have held them immune from liabil ty upon one or more of the following grounds: 1. Public policy; 2. That their funds are held in trust, the diversion of which the courts will not permit, because (a) it might result in destruction of the charity, or (b) it is beyond the power of the trustees to divert them directly, and therefore they cannot do so indirectly; 3. Charities are agencies of government and therefore entitled to the government's immunity from suit; 4. One accepting charity impliedly assents to hold the giver immune from liability for injury; and with respect to liability for the acts of their servants; 5. The doctrine of respondeat superior does not apply to them, and particularly with respect to hospitals; 6. The employees of the hospital are independent contractors, and not the servants of charity; and 7. The undertaking of the hospital is, in general, not such as to render it liable for injuries inflicted upon patients. All these

reasons have been more or less strongly disapproved, even by courts which have ruled in favor of exemption from liability. (14 A.L.R. 572).

The term "charity" is not applied in its strict sense. These organizations do not extend charity as it is commonly known, for in the large majority of cases the recipient of the charity, as it is called, pays for what he receives. This is what is to be expected, for by the receipt of remuneration for their services they are enabled to continue their work. Many institutions are supported by endowments and the patient or student pays only a percentage of the amount he should pay for the benefit received. In the pure charity cases (those in which the patients do not pay) the old rule that the charitable institution is immune from suit is applied invariably. However, where the recipient of the benefit pays, as in the case of a paying patient in a hospital, there seems to be a desire to throw the charity fiction out of the window.

The rule is not extended in behalf of privately-owned and money-making institutions such as privately-owned sanitariums which have always been held liable as private persons. They are neither performing a governmental function, nor do they bestow charity; therefore, there is no reason for applying the rule of immunity as t them.

This rule of immunity exists to some degree in practically every state of the Union. Some states adopt the rule by their court decisions that there is an absolute immunity from liability. In Roosch v. Peter Bent Brigham Hospital (235 Mass.66) it was held that a hospital run as a charity is not answerable in tort to a patient for negligence of its managing officers in selecting incompetent servants and agents. Here the rule seemed to be extended pretty much to its limit.

The rule is applied only against beneficiaries of the charitab institution and not against strangers. In any action by a pedestri an against a public hospital for injuries suffered when he was stru by an ambulance the court said, "The law may imply an intention on the part of the donors of the charitable funds that such funds shal be used for the charitable purpose only, and then imply an acquiescence in this intention by all persons who accept the benefits of the charity and in that way spell out a waiver by such persons of any responsibility of the institution for the negligence or torts of its servants. If the courts want to exempt such institutions, this may be a tenable, though some may thing a rather ingenious or far-fetched, ground on which to do it. But no such acquiescence or waiver can be attributed to an outsider; to a person run over in th highway by the ambulance of such an institution, by the negligence o its driver." (Kellogg v. Church Charity Foundation, 203 N.Y.191). This case seems to question the validity of the trust-fund doctrine as applied to charitable institutions. The courts of other states have flatly repudiated the trust-fund theory (Bruce v. Y.M.C.A., 51 Nev. 372, 277 Pac.798).

The Court of Appeals in Phillips v. Buffalo General Hospital (239 N.Y.188) declined to adopt the rule that the recipient of a benefit from a charitable institution waives any right to sue such institution for injuries; and decided the case on the principle of agency, saying that the doctrine of respondeat superior did not apply. In that case a paying patient was denied a recovery for injuries sustained when an orderly negligently placed a hot water bot-

tle against her body. The Appellate Division applied this same principle in Klein v. New York Eye & Ear Infirmary (210 App.Div.770).

A university which is a public charity is not liable for errors of professors, instructors, or other members of its staff of teachers where reasonable care has been used in the selection of such employee (Hamburger v. Cornell University, 240 N.Y.328). In this State there is a duty upon the part of a public charity to exercise reasonable care in the selection of its servants and this duty is non-delegable (Goodman v. Brooklyn Hebrew Orphan Asylum, 178 App. Div. 682).

The rule in this State, as elsewhere, is well settled that a public hospital is not liable for the negligence of its doctors or nurses. (Schloendorff v. Society of New York Hospital, 211 N.Y.125) The doctors and nurses are not under the direction and control of the hospital, the strict relation of master and servant does not exist, and, therefore, it is not liable for their acts. (Mills v. Society of New York Hospital, 242 App.Div. 245, af'd 270 N.Y.594). Plaintiff was suing for the death of her intestate who was a patient in the hospital for mentally defectives. He was permitted to go for a walk on a public highway with four other patients accompanied by one attendant, and while on this walk he killed himself. The court said that permitting him to go out so attended was merely error of medical judgment, and dismissed the complaint.

In McCormack v. Jewish Hospital of Brooklyn, (246 App.Div.731) defendant sent an ambulance for plaintiff. While carrying plaintiff downstairs on a stretcher she fell off. The trial judge dismissed the complaint because defendant was a charitable institution. The Appellate Division, however, sent it back for a new trial because it did not appear from the former proceedings what relation the persons carrying the stretcher bore to the defendant. Apparently the defendant would be liable for the acts of some employees. When an unauthorized autopsy is performed on a deceased patient the hospital is liable for the wrong. The reasons for the rule that a charitable hospital is not liable to patients because of wrongful acts of hospital servants are inapplicable when the sufferer is not a patient. In a case like this it would be a surviving spouse for example who would be the sufferer. (Grawunder v. Beth Israel Hospital Ass'n, 242 App. Div. 56, af'd 266 N.Y.605).

A change of public policy was declared by the Court of Appeals in Sheehan v. North Country Community Hospital (273 N.Y.163). Loughran, J., writing for the Court, said, "moreover, the now declared public policy of the State is that persons damaged by the torts of those acting as its officers and employees need not contribute their losses to the purposes of government. (Court of Claims Act §12-a). We think it would not be a harmonious policy that would require this plaintiff to put up with her injuries on the score that the appellant is a charitable corporation." In this case plaintiff was a paying patient and was injured through the negligence of a servant of defendant while being transported from the hospital to her home in an ambulance.

No valid reason is apparent for granting immunity to a charitable institution for the negligence of its servants, and for placing the entire responsibility of an injury upon innocent third persons and their families. Charitable institutions are frequently conducted upon a large scale, with all modern conveniences and appliances of a highly complicated nature, which enormously increased the risk of

injury, and any doctrine of complete exemption would lead to carelessness, neglect, and injury to both person and property. While such institutions should be encouraged, and those who are charitably inclined should likewise be encouraged to support them, this encouragement must not be carried to the point where injustice would be done to others. Innocent persons should not suffer through another's fault.

NEIL HESSON, JR.

CURRENT LEGISLATION

1937 SESSION LAWS - CHAPTERS 1 THROUGH 283

Following the precedent inaugurated last year, the Law Review presents a digest of current legislation. Choice of material is limited, due to the fact that the Session Laws are not complete as we go to press, but an attempt has been made to select those chapters which are of particular interest to law students. Unless otherwise indicated, the sections are effective immediately.

CORPORATIONS: Where a corporation is required by law to obtain leave of court to sell, mortgage, or lease real property owned by it, and such real property is situated without the State, its application may be made to the Supreme Court of the judicial district, or to the County Court of the county wherein it has its office or principal place of business. (Laws 1937 Chap.44, amending §50 G.C.L.)

No corporation is required to obtain leave of court to sell, mortgage, or lease real property which it has acquired upon a sale in an action to foreclose a mortgage held by it, or which it has acquired by deed in lieu of foreclosure of a mortgage held by it. (Laws 1937 Chap.237, adding §52-a to G.C.L.)

CRIMINAL LAW: The punishment for murder in the first degree is death (Penal L.§1045), but a jury may now recommend life imprisonment of a defendant whom it finds guilty of a felony murder. (Laws 1937 Chap. 67, adding §1045-a to the Penal Law)

DOMESTIC RELATIONS: An action to dissolve a marriage upon the groun of absence may now be maintained (1) where the petitioner is a resi dent of the State and has been a resident thereof for one year immediately preceding the commencement of the action, or (2) where th matrimonial domicile was within the State when the absent spouse disappeared. Formerly there was no such jurisdictional requirement (Laws 1937, Chap.49, adding new Subd.3 to §7-a of the Domestic Relations Law).

PRACTICE: Joint stock associations and business trusts doing business in this State must file with the Secretary of State a certificate designating him as the agent upon whom process may be served in any action or proceeding brought against them. Service may then be effected by delivering to the Secretary of State duplicate copies of the process. If the certificate is not filed, no action may be maintained in the courts of this State upon a contract made here prior to the time when the certificate is filed. (Laws 1937, Chap. 66, adding new Art.4 to Gen. Assn. L., in effect Sept. 1,1937

In effecting service upon a non-resident under the Vehicle and Traffic Law, it is now required that the defendant's return receipt, plaintiff's affidavit of compliance with the terms of the statute, and a copy of the summons and complaint must be filed with the clerk of the court in which the action is pending within thirty days after the return receipt has been received. In case personal service is made without the State, proof thereof must be filed within thirty days after such service has been made. While the statute formerly required the filing of the papers, there was no time limitation. (Laws 1937, Chap.94, amending §52, Vehicle and Traffic L., in effect Sept. 1).

No presumption of consideration arises from the fact that a written instrument is under seal. While an executory agreement which modifies, changes, or discharges an instrument under seal must be in writing and signed by the party to be charged, it is no longer necessary that it be under seal. Lastly, an undisclosed principal may now sue or be sued in an action founded upon a sealed instrument. (Laws 1937, Chap.80, amending §342 C.P.A.)

A defendant may now apply for an order of interpleader after he has interposed his answer. The statute formerly read that the application might be made "at any time before answer." These words have been deleted. (Laws 1937, Chap.109, amending §287, C.P.A., in effect September 1).

A judgment against a municipal corporation is excepted from the statute providing that a judgment becomes a lien upon the real property of the judgment debtor for ten years. (Laws 1937, Chap. 268, amending §510 C.P.A.)

Effective September 1, 1937, a verdict may be rendered by five sixths of the jurors constituting the jury in a civil case. While this applies only to civil actions, it includes such actions in all courts of the State, whether of record or not of record. (Laws 1937 Chap.120, adding new §463-a to C.P.A.)

SURROGATE COURT ACT: A will construction may now be had after the judicial settlement of the accounts of an executor. The statute formerly read that such a proceeding might be instituted "either at the time of or prior to the filing of a petition for a judicial settlement." These words have been deleted. (Laws 1937 Chap.18 amending §145 S.C.A.)

Where a party appears by attorney in a proceeding before the Surrogate, notice of appeal from the decree or order must be served upon the attorney, and cannot, as was formerly the case, be served upon the party himself. (Laws 1937, Chap. 18, amending §293 S.C.A.

It is now provided that where the appraised value of the estate of a decedent is less than the amount of the bond required to be filed by the will of the decedent, the executor or trustee may take application for an order reducing the amount of the bond. (Laws 1937, Chap. 39, amending §111 S.C.A., in effect September 1).

In order to commence proceedings supplementary to judgment, founded upon a decree of the Surrogate directing the payment of a

sum of money into court, or to one or more parties, "no execution need be issued and the decree shall have the same force and effect as though it were a judgment of the county court...." This merely conforms the section to the new Art.45, C.P.A. relating to proceedings supplementary to judgment. (Laws 1937 Chap.196, amending §83 S.C.A.)

Authority is now specifically given to a testamentary trustee not only to sell or mortgage, but also to lease or exchange, real property belonging to the trust estate. And the section provides that the order directing the sale, etc., shall be binding upon all persons having any interest in the property who have been made parties to the proceeding. (Laws 1937 Chap.270, amending §250-a, S.C.A., in effect September 1).

REAL PROPERTY: Whenever a limitation in a deed would, if containe in a will, create a tenancy in common with cross-remainders betwee the tenants in common, it shall have the same effect in the deed. (Laws 1937, Chap.48, adding new §66-a to R.P.L. in effect Septembe 1).

The Real Property Law provides that whenever real property descends to a distributee or passes to a devisee, and is subject t a mortgage executed by any ancestor or testator, such distributee or devisee must satisfy the mortgate out of his own property unless the will expressly directs otherwise. This section has been broadened to include not only mortgages but also any other charge, including a lien for unpaid purchase money. This amendment applies only to estates or wills of persons dying after August 31, 1937. (Laws 1937 Chap.75 amending §250, R.P.L.)

When a tenant surrenders possession of leased premises by reason of their destruction or injury by the elements, rent paid in advance or which may have accrued at that time must be adjusted to the date of the surrender. The former rule was that the tenant remained liable for rent which had accrued at the time of the surrender, even though such rent was payable in advance. (Laws 1937 Chap. 100, amending §227 R.P.L.)

The rule that an owner of an estate for life or for years in real property is liable in damages for waste committed by him, has been somewhat modified by adding a new section to R.P.L. Where such an owner desires to make an alteration in, or a replacement of, a structure on the land, he may serve written notice of his intention to do so upon each owner of a reversion or of a future interest. He must then establish (1) that the proposed alteration or replacement is one which an owner in fee of such land would be likely to make; (2) that it will not reduce the market value of the future interests; (3) that it is not in violation of any agreement or restriction; (4) that the expectancy, or unexpired term of the estate is not less than five years. If the owner of a future interest requires it, he must furnish security that the proposed alteration or replacement will be completed, and protecting such owner against liability for the expenses thereof. Upon compliance with these conditions he will not be liable in damages for making the alteration or replacement, nor will an action lie for an injunction to prevent him from doing so. This section applies only

to estates created on or after September 1. (Laws 1937, Chap.165, adding new §537 to R.P.L.)

A new statute has been enacted consolidating, so far as it is possible to do so, the procedure governing the sale, mortgage, or lease of real property subject to a "spendthrift" trust, and of real property, the ownership of which is divided by deed or will into a life estate with remainder over, either of the property itself or of its proceeds after a directed sale upon the death of the life tenant, to persons whose identity cannot be ascertained until the life tenant dies. Sections 67 through 71 and §107 have been repealed, and in their place fifteen new sections, constitutin §§107 to 107-n inclusive, have been enacted. A trustee may apply for an order authorizing him not only to sell, mortgage, or lease, but also to acquire land adjacent to the trust property whenever such acquisition would improve the boundary lines of the trust property, or whenever the trust property and the adjacent property have the same building or physically connected buildings thereon. In all cases the application must be made to a term of Supreme Court held within the judicial district in which the real property is situated. Formerly it might be made to any term of the Supreme Court. Written notice of the application must be personally given to all persons having any interest in the property, including the life tenant or trust beneficiary, and whether their interests are vested or contingent, in reversion or remainder. Persons having a power to appoint the property, and the appointee of a power theretofore exercised, are also entitled to notice. The requirement as to notice works no change in the statute. All that it is now necessary to show is, that the act to be authorized is expedient. Formerly, where the application was made by a person other than a trustee he was required to show, either that the property was unproductive or that circumstances occurring subsequent to the deed or will, or other peculiar circumstances, rendered the sale, etc., necessary or proper. Furthermore, no sale, etc., could be had in such case unless all persons having an interest in the property filed an instrument acknowledging their consent to the order granting the application. Now the granting of the application is not necessarily precluded by the fact that their consent cannot be obtained. A trustee was required to show the circumstances rendering the sale, etc., necessary or proper. If the order directing a sale, etc., is granted it is executed by the trustee where he made the application, and by a referee appointed by the court where the application was made by any other person. The trustee or referee enters into an agreement which must be confirmed by the court. He then executes the deed, mortgage, or lease, which binds all persons having an interest in the property. This is substantially the procedure formerly required. It is provided generally that the order of confirmation shall include "such provisions as justice may require" for the management and distribution of the fund to be derive from the ordered transaction. Under the former statute, where a sale or mortgage was authorized uponthe application of a person oth than a trustee, the proceeds were paid to a trustee approved by the court, to be by him invested, the income to be paid to the life tenant during life, and upon his death the principal to be paid in suc manner as the court directed upon an accounting. (Laws 1937, Chap. 141, repealing §§67-71 inclusive and §107, and adding new §§107-107-n inclusive to R.P.L., in effect September 1).

CAREY DEAN WINNE

ACCUMULATIONS - EFFECT OF INVALID DIRECTION TO ACCUMULATE

The effect to be given to an invalid direction to accumulate income from property was again brought before the court and discussed by Judge Lehman in Hawthorne v. Smith (273 N.Y.291). In order to fully appreciate the position taken by Mr. Lehman, however, it is necessary first to examine a few of the cases on which the decision is based.

One of the early decisions on the subject is reported in an opinion by Judge Andrews in 1883 (Pray v. Hagemen, 92 N.Y.508). This was a case in which property was left in trust for the benefit of three children. The income up to a certain maximum was to be applied to the education and support of the beneficiaries; "and the balance of such income shall, from time to time be added to the share or sub-share from which the same proceeded, and accumulated as principal until he or she arrives at the age of 21 years; after which period the whole of such income shall be paid over, quarter-yearly, to such child." The principal upon the death of the beneficiary was then to go to his issue, if any, and if none, then to others.

The question as to the validity of these provisions was raised by a judgment creditor of one of the beneficiaries, he claiming that the accumulations belonged to the beneficiary, now an adult, and should thus be applied in satisfaction of plaintiff's judgment.

The court starts with the proposition that "an accumulation of the rents and profits of land for the benefit of one or more persons, may be directed by will or deed for the benefit of minors in being when the accumulation commences and to terminate with their minority." (1 Rev.St.726 §37). The question then is whether or not the accumulation must be for the sole benefit of the minor. Her the beneficiary receives some benefit from the accumulation since it would enlarge the fund from which he was to receive the income after majority. However, it is not for his sole benefit since the remaindermen ultimately obtain the accumulations.

In the opinion of the court, it is plain that the general purpose of the statute requires "that when the period of accumulation ceases, the accumulated fund shall then be released from further restraint and paid over to the person for whose benefit the accumulation was authorized."

It follows that the direction for accumulation is void since it is not for the sole benefit of the minor,and, being void, must be stricken from the will. What remains is an equitable life estate in the beneficiary which carries with it all accruing rents and profits.

Having once determined just what accumulations were valid, the court was next met with the problem of the disposition of invalid accumulations. The court has considered this question in two leading cases (Cochrane v. Schell, 140 N.Y.516, and Matter of Hoyt, 116 A.D.217, aff'd 189 N.Y.511). The court was justified in arriving at diverse conclusions since the cases are clearly distinguishable. In Cochrane v. Schell (supra) the testator left the residue of his property in trust during the life of one of his daughters for the

payment of certain express annuities amounting to $20,000. The income from the trust estate was approximately $80,000, about $60,000 thus being undisposed of. At the termination of the trust the whole estate was to go to such of the testator's grandchildren as were then living, the issue of any deceased grandchild to take the parent's share.

"There was no express direction for the accumulation of the large surplus income which would be likely to arise and be received by the trustees, nor any express disposition thereof as such by the will. But in the absence of any express direction for accumulation or other disposition, it would be the duty of the trustees under the will to retain and accumulate it, and from this duty a direction for accumulation is implied."

This implied direction for accumulation being invalid, the statute (1 Rev.St.726 §40, now §63 R.P.L.) disposes of the accumulation as follows: "When, in consequence of a valid limitation of an expectant estate, there shall be a valid suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate."

In this case there was a valid suspension of an expectant estate as the remainder, during the trust term, is not vested in the grandchildren, since the issue of a grandchild born during the trust term, may come in and take in the event of the decease of any grandchild during the continuance of the trust; and, in addition, there is no valid direction for accumulation. Thus, the statute is directly applicable and the grandchildren, as persons presumptively entitled to the next eventual estate take the accumulations.

The distinction between this case and Matter of Hoyt (supra) is that in the latter case there was no direction as to the amount of income to be expended. The testator designated a certain fund to be held in trust for his daughter for life and directed his trustees "to keep the same invested and to collect and receive the interest, dividends, and income therefrom and from each and every part thereof and to apply to her use for and during her natural life in the most bounteous and liberal manner as to expenditure and so as to promote her convenience and comfort and gratify her reasonable desires, the said interest, dividends, and income so to be collected and received as the same shall be required for her use and benefit. It was further directed that, at the termination of the trust, the principal and unexpended income go to certain persons named.

The court here holds that the intent of the testator, from the words used, was that the daughter was the only one to be benefitted and, therefore, that the entire income should be devoted to her use Any direction, express or implied, for an accumulation would be inconsistent with the implied power given to the trustees to use any amount up to the entire income for the use of the daughter. Even if it be assumed that there was an implied direction for accumulations, the statute as applied in Cochrane v. Schell (supra) is not applicable here. There is a perfect disposition of the entire income when the invalid direction for accumulation is eliminated since the trustees have the power to apply the entire income to the daughter's use. The invalid portion will thus be stricken from the will

and full effect given to the valid portion so as to give the entire income to the daughter.

The recent case of Hawthorne v. Smith (273 N.Y.291) is not exactly analagous to either of the preceeding cases, but the court follows the decision enunciated in the Hoyt Case (supra). In the Hawthorne case the settlor expressly directed the trustee to expend on behalf of the beneficiary during his minority the whole or such portion of the net income as in the judgment of the trustee should be wise and expedient. The settlor went on, however, and further provided that at the termination of the trust period the principal "together with all accumulations and unexpended and undistributed income" should be paid to the settlor's husband or if not living, then to the settlor's estate.

Here is a case, then, where the settlor expressly authorized the trustee to spend the entire income for the benefit of the infant and yet expressly directed that any accumulated income should be distributed in contravention to statute. In reaching the conclusion that the infant is entitled to the entire income, the court decides that the primary purpose of the settlor in directing the accumulation was for the benefit of the infant so that any surplus existing in any one year might thereafter be applied to the use of the infant. No part of the income during the minority of the beneficiary might be used for any other purpose. It is only the attempted gift of the unexpended income at the termination of the trust that is invalid. Therefore, by removing the illegal portion, effect may be given to the primary intent and purpose of the settlor to the end that the beneficiary receive the entire income from the property.

It will be seen that this argument could not have been used in Matter of Hoyt (supra) since there the income was to go to the daughter for life and thus any direction for an accumulation would have been invalid since it would have exceeded the period of minority. However, from these cases the general rule may be drawn that whenever, from a reading of the language used by the settlor, it can be said that the trustee is empowered to spend the entire income for the benefit of the beneficiary, any direction for an unlawful accumulation will be disregarded and the beneficiary will be entitled to the entire income.

DALWIN JOHN NILES

NEGOTIABLE INSTRUMENTS - DELIVERY - LACK OF CONSIDERATION

Clara Bergoff was the owner of a bond and mortgage, payment of which was guaranteed by an officer of the Mount Vernon Trust Company Miss Bergoff's mother was indebted to the Trust Company in an amount slightly more than the amount of the bond owned by the daughter. It was agreed that Miss Bergoff would assign the bond and mortgage to the Bank which would cancel the mother's debt to the amount of the bond. To conceal the fact that one of its assets was to be a bond guaranteed by its own officer, the Bank requested Miss Bergoff to execute a note to the Bank for the amount of the mortgage. She did not know the purpose of the note, nor was she informed that it was intended to deceive thereby the bank examiners, nor did she have any idea that they would be so deceived. She received no consideration and was informed by the officers of the Bank that she would not be held liable on the note. She asserted these defenses when the Bank brought an action on the note. The Court of Appeals in Mount Vernon Trust Co. v. Bergoff (272 N.Y.192, 5 N.E.(2d) 196), rejected the defenses and held the maker liable on her note. In an opinion written by Judge Lehman, the Court held that the defendant was estopped to assert these defenses on the grounds of public policy. "In such a case it is immaterial whether or not the note was based on good consideration. The stability of banks is a matter of such public concern that the State or Federal Government regulates the affairs of each bank and periodically examines its apparent condition. The State cannot sanction any device intended to give a false appearance to a transaction or increase the apparent stability of a bank. The defendant may not have intended to deceive any person, but, when she executed and delivered to the plaintiff Bank an instrument which is in form a note, she was chargeable with knowledge that, for the accommodation of the Bank, she was aiding the Bank to conceal the actual transaction. Public policy requires that a person who, for the accommodation of the bank executes an instrument which is in form a binding obligation, should be estopped from thereafter asserting that simultaneously the parties agreed that the instrument should not be enforced." (Mt. Vernon Trust Co. v. Bergoff, supra).

The case criticises Higgins v. Ridgway (153 N.Y.130) which held that a bank clerk who made a note for $15,000 to the order of the bank relying on a director's promise that it would not be enforced and who received no consideration was not liable on the note. As Judge Lehman points out in the Bergoff case, public policy was not there discussed. While not expressly overthrown, that case is so criticised, as opening the door to fraud, and its authority so weakened that it is in effect, overruled at least where the bank intended to deceive bank examiners. In the Bergoff case it was not shown whether there was such deception. The intent on the part of the bank was held to be enough to make the defense of no avail.

In Bay Parkway Nat'l Bank v. Shalom, 270 N.Y.172, the court said: "When one knows that his note is to be treated as an asset of a bank, and as a result, bank examiners are deceived and depositors continue their relations on the faith of an assumed solvency, then he is estopped from pleading the defense of no consideration." The doctrine of that case has been, apparently extended in the instant case so that actual deception is no longer necessary.

Section 54 of the New York State Negotiable Instruments Law provides: "Absence or failure of consideration is a matter of defense as against any person not a holder in due course; and partial failure is a defense pro tanto whether the failure is an ascertained and liquidated amount or otherwise." In the Bergoff case there was a complete absence of consideration. The statute gives a defense, but the court of last resort in this State rejects it. It indulges in a bit of judicial legislation and refuses to allow, even against the original payee, a complete defense given by the law-making branch of the State Government.

It may be true that a person giving a note to a bank should know that it will be used for some purpose. The signing of the note was certainly not an idle gesture. The maker should know better than to rely on the verbal promise of the bank's officer when she provides him with an absolute written promise for the payment of money. Nevertheless, it is difficult for me to see how there can be an estoppel in this case. Reliance is a necessary element in estoppel. Where no one relied on the validity of the note, the defense should be available. The Bergoff case is clearly distinguishable from cases where (as in the Shalom case, supra), the note was actually used to obtain approval of the banking department to the banks continuing in business. Here there was no evidence that the bank examiners inspected while this note was in the plaintiff's possession. No proof was offered to show that the examiners were in any respect misled. The general public never knew of the note. They rely not on the notes that the bank holds, but on the fact that the banking department allows the bank to go on. The bank knew of the defect and could not, therefore, rely on the appearance. To allow thebank to collect this note is to allow it to take advantage of its own wrongful intent.

The fact remains, however, that in spite of the clear meaning of §54 of the Negotiable Instruments Law, the Court of Appeals has established the rule that where a bank is the payee and a bank examiner may be deceived by the note, the maker may not assert the defense of no consideration, and the court will not consider the question of actual deception, but will conclude the inquiry, once the payee is disclosed as a moneyed institution, at least when the intent to deceive appears. The rule as to individual payees appears to continue unaffected by the case under discussion.

MORTON M. Z. LYNN

QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest, and present a fair method by which you can test your own, or anyone else's legal knowledge. Compare your answers with those given on Page 135 of this issue.

1. B owns a bond and mortgage, which is guaranteed by A, an officer of X Bank. On assigning to the Bank, B executes a note in its favor, the latter intending to conceal the fact that one of its assets is guaranteed by its own officer. At the time, the Bank agrees that B will not be held on the note.
   (a) May X recover on the note?
   (b) May X recover where the Bank Examiners are deceived by the note?

2. Federal legislation sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing, although such employees are not hired by an interstate carrier.
   (a) Has such legislation been held constitutional as applied to conditions of local employment, and if so, as an exercise of wha power of Congress?
   (b) Is the freedom of the press abridged by the application of such legislation to the Associated Press?
   (c) If labor relations affect interstate commerce, may Congress provide for reinstatement of employees discharged because of union activity?

3. A creates a trust for the minority of B, who is to have such por tion of the income as in the judgment of the trustee is wise and expedient. At the termination of the trust, the principal and accumulated income is to be paid to C.
   (a) Is the direction for accumulation valid?
   (b) If not, would C, the person entitled to the next eventual estate, take the accumulated income?

4. A, a paying patient in the hospital of a charitable corporation is injured while being removed in an ambulance to her home. The am bulance driver is negligent. Is the charitable corporation ex-empt from liability?

5. W seeks a separation in the courts of this State. H counter-claims for a decree of divorce. W puts in evidence of a decree obtained by H in Nevada, admittedly void for lack of jurisdic-tion. Is H estopped to seek a divorce in this State?

6. A operates a motion picture theatre, and employs B as a pro-jectionist. A discharges B, and personally undertakes the duties formerly performed by B. B places pickets about the theatre in an attempt to induce A to re-employ him. On an ap-plication for an injunction pendente lite, is this to be deemed a "labor dispute," so as to restrict the power of the court to issue the order, to the limitations imposed by §896-a C.P.A.?

7. K employs H. The latter obtains a ham in return for services to be rendered. The ham turns out to be impure, and H now sues on the ground that K impliedly warranted that the ham was reason

ably fit for human consumption. Assuming no negligence, do these facts constitute a cause of action on the ground alleged?

8. B is engaged in distributing toilet preparations to retail dealers. Several written contracts are made with individual retailers fixing resale prices. D, a retailer, refuses to enter into a similar contract or to observe the scale of prices so established. May he be restrained from selling at a price less than that stipulated in the contracts made by B with the other retail dealers?

N O T E S

PRACTICE NOTES.- Three of the more significant cases relating to procedure which were decided recently are Mat. Kaplan v. Peyser (273 N.Y.147); Howard Converter v. French Art Mills (273 N.Y.238) and Geary v. Geary (272 N.Y.390).

Under §§684-5 C.P.A., a judgment creditor may levy ten percent of the debtor's income from trust funds which exceed twelve dollars weekly. By the Laws of 1935, however, it was provided that "notwithstanding the provisions" of these sections, the court may order the judgment debtor to pay directly to the creditor "such portion of his income, however or whenever earned or acquired, after due regard for the reasonable requirements of the judgment debtor and his family." (§93 C.P.A.) Such language standing by itself might be supposed to apply to income "acquired" by a judgment debtor from a trust fund created for his benefit by another, and this was the view taken by the lower court in the Kaplan case (No. 1, supra). On appeal, it was, however, determined that the latter section must be read together with §792, as both are part of Art.45 C.P.A.,which governs supplementary proceedings. This last provides that the article in question does not authorize supplementary proceedings as a means of reaching a trust fund, created by another than the judgment debtor, for the latter's benefit. §792, as interpreted prior to 1935, allowed the application of undistributed trust income. But only the surplus over and above the amount necessary for the support of the judgment debtor was thus exposed, and the amount of such surplus was not "properly ascertainable under supplementary proceedings to discover and appropriate the debtor's property to the satisfaction of the judgment, but only in a suit or proceeding where the issue is directly made upon the amount necessary for the debtor's support, and to whichthe trustees and cestui que trust are parties." (Graff v. Bennett, 31 N.Y.9). In refusing to alter this interpretation in the present case, merely because of the broad language of the new section, the conclusion arrived at was sound. In the light of experience, there are few questions more difficult of determination than the amount of income necessary for the support of a beneficiary whose creditors are unpaid, and the issue should be resolved in a judgment creditor's action to which the trustee is a necessary party rather than by summary orders operating after payment over to the beneficiary.

In Howard Converter v. French Art Mills (No. 2, supra) personal service was made without the State on an agent designated for service by a certificate filed in New Jersey according to its laws, by the defendant, a corporation of that State. By §235 C.P.A. the cour may obtain jurisdiction of the res by attaching the same and serving the summons "upon a defendant without the State in the same manner as if such service were made within the State." In the present case the defendant to be served is a foreign corporation. By §229, service may be made within the State in the first instance on the president and other specified officials of a foreign corporation of upon an agent designated by a certificate filed in the Department of State, the Department of Banks, etc. Placing a strict construction upon the language of the latter subdivision, the dissenting juctice contended that the section referred to certificates filed in our Department of State, etc., and it was not intended that our residents should have to search the files of a foreign government, nor

that they should be charged with knowledge of the requirements of the foreign law to determine the sufficiency of the certificate. However, four justices upheld this manner of service (Lehman and Finch not sitting), and the objection that the statute did not refer to authority conferred by a foreign statute was deemed without merit because of the all-embracing language of §235, and the fact that authority to serve the president of a foreign corporation is derived in part from his appointment under the laws of that State. His agency arises by reason of the laws of the state of incorporation as fully as one designated by certificate filed pursuant to the foreign statute. The reasonableness of such a determination is at least open to question. The statutory consent of a foreign corporation does not extend to causes of action arising in other states (Old Wayne Life Ass'n v. McDonough, 204 U.S.22), and the problem raised by this case is whether one state can take advantage of the statute of another state by reason of the fact that the cause of action arose therein, when the latter state constitutionally cannot.

In Geary v. Geary (No. 3, supra) constructive service of the summons, together with an order to show cause why sequestration should not be had, was made on a non-resident, in a separation action, and thereafter before judgment by default was entered, the defendant's property was sequestered. The words "in an action for divorce or separation" (1171-a) can only mean in an "action already pending or presently begun" (Matthews v. Matthews, 240 N.Y.28), so that the sequestration order if not made in a pending action must be followed by service, as in an attachment (id). The jurisdiction over the marriage status is unquestioned, and the present case holds jurisdiction over the property to be incident thereto, provided it was seized before judgment. Admitting that the property presumably must be seized when jurisdiction is first assumed wherever possession of the specific res is the foundation of jurisdiction, so that the defendant may have notice and opportunity to be heard at every step leading to the disposition of his property, the court nevertheless held the status rather, than the property, was the foundation of jurisdiction and that due process was had, since the defendant had opportunity to contest the seizure before judgment was had. According to this line of reasoning, the determining fact is that the defendant has notice and opportunity to be heard at every step leading to the disposition of his property, so that seizure need only precede the assumption of jurisdiction to adjudicate as to rights in the property. But this power may depend not only on the findings as to the amount of support necessary, but also on the adjudication of the existence of the status and of grounds for separation. These facts may well be litigated before the property is seized. To say that, because the defendant had notice and opportunity to litigate these issues, due to the court's jurisdiction over the status, property thereafter seized is bound by the determination, is tantamount to saying that attachment at any point before judgment in an action at law would subject the property thus seized to the determination of issues litigated at the time when the court had no jurisdiction over it. In both the defendant would have notice; in both a specific res is to be bound because of jurisdiction over another res,- in the one case other property, in the other, the marriage res. It is submitted that this reasoning will lead to results counter to well settled principles. Jurisdiction is obtained over a specific res, not over the person, nor any other res.

A. J. O'C.

* * * *

* * *

STATUTE OF LIMITATIONS - PART PAYMENT EXTENSION OF GUARANTOR'S LIABILITY.- Although the law of Guarantor's liability has long been settled in this State, questions continue to arise as to certain phases of detail in regard thereto. The case of People's Trust Co. of Malone v. O'Neil, (273 N.Y.312), is the most recent controversy in this field which the Court of Appeals has been called upon to decide. It might be pointed out, furthermore, before proceeding further, that this decision was not unanimous, thus indicating that plenty of controversy still permeates the mechanical operations of the otherwise basically established guaranty law.

The respondent bank brought the original action upon two demand negotiable promissory notes. The action was brought against the appellant upon the basis of a guaranty which she had endorsed upon the backs of the two notes in the following language: "For value received I hereby guarantee the payment of the within note and hereby waive demand of payment, protest and notice of protest on the same." This defendant never made any payments on the notes and the maker, who was her son, has made only partial payments. The controversy herein arises because the maker made these partial payments, which, of course (and this point is conceded), extend the Statute of Limitations against him to six years after the date of the last payment. Now it is the bank's contention that the defendant likewise is bound by the extension so that she too is still liable, even though six years has elapsed from the issuance of the notes.

The trial court agreed with the plaintiff's contention and this holding was affirmed by the Appellate Division in the Third Judicial Department. The Court of Appeals, however, reversed these lower courts by a vote of five-to-one, O'Brien, J. dissenting. The prevailing opinion, which exonerates the defendant from any liability after the expiration of the six-year period, was written by Judge Hubbs and is based on the straightforward analogy between the situation at hand and that in which one joint debtor makes a payment extending the Statute of Limitations as to himself. In this latter situation, the courts have repeatedly held that the extension as to the debtor who made the payment does not apply to those jointly liable with him. (Hoover v. Hubbard,202 N.Y.289; State Bank v. Mangan, 240 A.D.327, aff'd 269 N.Y.598).

While, of course, that analogy is by no means absolute as a guarantor is certainly not a joint debtor, yet in reason it is fund mentally sound. It all seems to me to go back to the basic contractual principle, that when one person contracts to do a certain thing -- in this case pay a note within six years -- that person cannot be bound beyond this contractual limit merely because another party to the transaction binds himself to do something further than was contemplated in the original agreement. If the defendant had authorized the partial payments, the situation would be different. But as there was no such authority given to the maker here, the rule on this point, which was set forth in Van Keuren v. Parmelee (2 N.Y.523 should be followed. It was there said, "that such acknowledgment or promise, to take a debt out of the statute, must be made by the party to be charged or by some person authorized by him."

Thus the court holds that the defendant's liability was for six years, and six years only, and that merely because the maker of the note bound himself for several years more (and he did so without any authorization by the guarantor) does not mean that this six-year

liability has been extended as to the defendant. I am frankly at a loss to see any real argumentative merit to the contrary viewpoint. Judge O'Brien seems to rely on the theory that the defendant was an absolute guarantor as distinguished from an endorser. I fail to see that this makes any difference, however, because she was an absolute guarantor for six years only. To say that a continuing guaranty can be inferred from the facts of this situation is stretching the bonds of judicial "inference" to an impossible degree. The allowance of such an inference would establish a precedent that would overthrow not only all the law on this subject but also all the logic which is behind this law. The prevailing opinion seems to be well in line with the accepted theories in regard to this subject and seems a proper solution of the problem which was presented in this precise form for the first time in New York by this case.

M. S.

* * * *

ABUSE OF PROCESS - MALICIOUS PROSECUTION SUFFICIENCY OF COMPLAINT.- The recent case of Hauser v. Bartow (273 N.Y.370) presented an anomalous situation. The plaintiff apparently alleged a substantial grievance against the defendant in his complaint but the court held that the complaint failed to state a cause of action.

The complaint alleged that the defendant conspired with others to have the plaintiff declared incompetent; that without the knowledge of plaintiff she commenced a proceeding to have herself appointed committee of his person and property falsely representing therein that plaintiff was violent and that it would endanger his life to appear in court, thereby inducing the court to issue its process; that defendant was thereafter appointed committee of his person and property and as such managed his property; that thereafter, upon his application, a jury trial was had as to his competency, resulting in a verdict that he was then competent and that defendant was discharged as committee and directed to account, which she did, whereupon allowances were made to her for commissions, attorney's fees and other expenses.

The action brought was designated an action for malicious abuse of process and when tested by the elements of such an action the court was in agreement that the complaint did not state a cause of action. On this point the decision was very clear and valuable as the Court of Appeals has not often been called upon to declare what the law is in an action for abuse of process. The court reaffirmed what was said about abuse of process in the case of Dean v. Kochendorfer (237 N.Y.384) and further said: "As soon as the actor uses the process of the court, not to effect its proper function, but to accomplish through it some collateral object, he commits the tort. It is not enough that the actor have an ulterior motive in using the process of the court."

There was clearly no abuse of process in this case as nowhere in the complaint, as was pointed out by the court, could there be found any allegation that the defendant did any act by virtue of the order adjudging the plaintiff incompetent and appointing her as committee of his person and property which was not within the scope of defendant's duties as such committee or was in excess of the powers granted to the defendant as such committee.

When the validity of the complaint was considered as alleging a cause of action for malicious prosecution the court disagreed, two judges being of the opinion that it did allege such a cause of action. On this score the question resolved itself into whether or not the former incompetency proceeding had been determined in plaintiff's favor, that it had been so determined being a necessary allegation in an action for malicious prosecution. Chief Justice Crane who was one of the dissenting justices was of the opinion that one who has been wrongfully declared insane without notice or hearing at the instance of another, acting maliciously, knowing the allegations of insanity to be false, must have some remedy for such injustice and he took the position that the complaint should be sustained as stating a cause of action for malicious prosecution.

Such a position is obviously most fair and just to the plaintiff but in view of the complaint it is not sustainable. The plaintiff did not allege that the original appointment of the defendant as plaintiff's committee was ever nullified for any reason. The plaintiff applied to the court and had the defendant discharged as a committee after plaintiff had been found by a jury to be competent, such could take place in any normal incompetency proceeding wherein the committee or person who instigated the proceeding acted righteously and with a good motive. If plaintiff had had defendant's original appointment revoked which he might have done, then he could have alleged that the former proceeding had been terminated in his favor. By alleging the discharge of the defendant and an accounting by her in which she was made allowances for commissions and expenses he alleged a perfectly normal discharge of the defendant as a committee and not one capable of supporting an action for malicious prosecution.

The Hauser case strikingly exemplifies the value of correct procedure in obtaining redress. The plaintiff alleged a grievance recognized by the law but by his own procedure barred his remedy. The result may seem unfair to the plaintiff but it could not be avoided if the rules of law are to remain well fixed and certain.

E. S. D.

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ANSWERS

1. (a) Yes. (Mt. Vernon Trust Co. v. Bergdorf, 273 N.Y.192)

   (b) Yes. (Bay Parkway Nat'l Bank v. Shalom, 270 N.Y.172)
   Cf. Law Review p.126.

2. (a) Yes. (Board v. Jones & Laughlin Corp.,81 L.Ed.567; ___U.S.__

   (b) No. (Associated Press v. Board, 81 L.Ed.603; ___U.S.___)

   (c) Yes. Same cases. Cf. Law Review p.104.

3. (a) No. (Hawthorne v. Smith, 273 N.Y.291)

   (b) No. (id) Cf. Law Review p.123.

4. No. (Sheehan v. North Country Community Hospital,273 N.Y.163).
   Cf. Law Review p.114.

5. No. (Stevens v. Stevens, 273 N.Y.157, aff'g 248 A.D.544).
   Cf. Law Review Jan., 1937.

6. No. (Thompson v. Boekhout, 273 N.Y.390)

7. No. According to Haag v. Klee (162 Misc.250).

8. Yes. (Bourjois v. Dorfman,273 N.Y.167.

   (Cf. Old Dearborn v. Seagram, 299 U.S.183 in Law Review, January, 1937; and Doubleday Doran v. Macy, 269 N.Y.272, in Law Review June, 1936).

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